

**SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD
RESPONSE TO COMMENTS
ON
TENTATIVE ORDER No. R9-2004-001, NPDES No. CAS0108766**

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|---|----|
| Introduction..... | 2 |
| General Comments..... | 3 |
| Findings..... | 53 |
| Section B – Non-Storm Water Discharges | 59 |
| Section F – Development Planning..... | 60 |
| Section G - Construction Program..... | 70 |
| Section H.1 – Municipal Program | 76 |
| Section H.2 – Industrial/Commercial Facilities Program..... | 78 |
| Section H.3 – Residential Program..... | 88 |
| Section J – Illicit Discharge Detection and Elimination Program | 91 |
| Section K – Watershed-Based Activities | 92 |
| Attachment C – Definitions | 93 |
| Comments on the Fact Sheet/Technical Report..... | 95 |

Introduction

This document contains the San Diego Regional Water Quality Control Board's (SDRWQCB) responses to the following list of written and verbal comments on tentative Order No. R9-2004-001 (*Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the County of Riverside, the City of Murrieta, the City of Temecula and the Riverside County Flood Control and Water Conservation District within the Santa Margarita Watershed*) received by March 10, 2004.

Written Comments

- Construction Industry Coalition on Water Quality, January 28, 2004
- Riverside County Flood Control and Water Conservation District (District), January 28, 2004 (on behalf of all Permittees)
- City of Temecula, January 27, 2004
- Richards/Watson/Gershon, February 5, 2004 (USC Cost Study)
- Richards/Watson/Gershon, February 10, 2004 [1) Objection of City of Temecula to Conducting Hearing on Tentative Order No. R9-2004-001 as an Informal Proceeding and Request to Permit Cross Examination of Witnesses; and 2) Evidentiary Objections of the City of Temecula to Documents Purporting to Support Tentative Order No. R9-2004-001)
- State Water Resources Control Board (SWRCB), February 9, 2004
- Murrieta County Water District (MCWD), February 19, 2004
- Eastern Municipal Water District (EMWD), March 3, 2004
- San Diego Bay Council, March 4, 2004
- United States Environmental Protection Agency, Region IX (EPA), March 5, 2004
- Richards/Watson/Gershon, March 10, 2004
- District (on behalf of all Permittees), March 10, 2004

Verbal Comments – February 11, 2004 Hearing

- Dusty Williams, District
- Steve Stump, District
- Dan York, City of Murrieta
- Alex Gann, County of Riverside
- Joe Stone, City of Temecula
- Jason Uhley, District
- David Hogan, City of Temecula
- John Harris, Richards/Watson/Gershon (on behalf of the City of Temecula)
- Evan McGinley, Richards/Watson/Gershon (on behalf of the City of Temecula)

The majority of the written comments presented in this document were copied from electronic submittals. Written comments that were not received electronically, including portions of the District's January 28 letter, the Richards/Watson/Gershon February 5 and February 10 letters, the MCWD letter, and the EMWD letter, were either typed verbatim, or slightly paraphrased and shortened. Verbal comments were taken from the Reporter's Transcript of Proceedings from the

February 11, 2004 SDRWQCB Meeting. The only verbal comments that were addressed were those that were not also included in written comments.

Editorial and minor proposed changes that serve to clarify the Order have been made as underline/strike out text in the revised tentative Order without specific explanation. Other minor proposed changes that were not necessary to clarify the Order were not made and are not specifically addressed in this document.

General Comments

1. Comment (EPA):

Overall, we believe that the permit is fully consistent with the Clean Water Act (CWA), EPA regulations, and is appropriate for the Santa Margarita Watershed; aside from some relatively minor suggestions noted in our comments, we would urge the Board to adopt the permit largely as proposed.

Response:

Comment noted.

2. Comment (EPA):

We appreciate that Riverside County is subject to MS4 permitting by three different Regional Boards, and that consistency among the permits is desirable for the permittee. However, each permit also needs to be tailored to the specific watershed involved. The San Diego Regional Board's comparison of the provisions for the three Riverside County permits shows that the permits are reasonably similar and we believe that it should be possible for any differences to be accommodated by the permittee.

Response:

Comment noted.

3. Comment (San Diego Bay Council):

This permit, modeled on the proven and successful permits of Orange County and San Diego County, is a much needed improvement for the surface and ground waters of Riverside County.

Response:

Comment noted.

4. Comment (San Diego Bay Council):

Contrary to discharger assertions, the requirements of the new Riverside MS4 permit are clearly authorized under both the Federal Clean Water Act and California's Porter-Cologne Act. But, because the proposed permit requirements mirror those in Orange and San Diego Counties, the permit constitutes the Maximum Extent Practicable standard required by the federal Clean Water Act, and the Board need not even look to state law for authorization. In fact, we do not believe the Board has discretion to require anything less of the Riverside Co-permittees.

Response:

Comment noted.

5. Comment (San Diego Bay Council):

The need for the permit is urgent, as the dischargers proved again and again in testimony that they have not yet taken the requirements under their 1990 or 1998 permits seriously. The requirements in the tentative Order are fair, consistent, and will be effective when implemented.

Response:

Comment noted.

6. Comment (San Diego Bay Council):

Further, the deadlines in the permit are more than reasonable given the number of model programs already developed by San Diego and Orange County. The Board should also note, many of the elements of the proposed permit are already required under existing or previous permits.

Response:

Comment noted.

7. Comment (San Diego Bay Council):

This region has many of its beautiful rivers intact. For this, the local governments deserve credit. However, these jewels will be tarnished if the actions required under the tentative order are not pursued diligently. If the Regional Board fails to adopt the Tentative Order, in several years officials in Riverside County will be seeking millions of dollars to restore the Santa Margarita just as the officials in San Diego are seeking millions to restore the beleaguered San Diego River. This is our chance to get ahead of this curve.

Response:

Comment noted.

8. Comment (EMWD):

We currently have an ordinance in place that prohibits the discharge of storm water or runoff into the sewer system to ensure that the waste water treatment plant can meet permit limitations. Our treatment facilities are designed for municipal wastes and its associated flows and our treatment plants are not designed to take such flows. Please be advised of the limitations associated with the use of the local sanitary sewer systems for disposal of storm water and its potential waste stream.

Response:

Comment noted.

9. Comment (District, January 28, 2004):

The Permittees request additional time to review the tentative Order.

Response:

In response to this request, the SDRWQCB extended the public comment period three weeks, from February 18, 2004 to March 10, 2004. The tentative Order was originally issued to the public on December 15, 2003, providing almost 90 days to review and comment. In addition, the SDRWQCB held a public workshop on January 23, 2004 to answer questions about the tentative Order and discuss potential new requirements. Overall, the SDRWQCB provided ample time to review and comment on the tentative Order.

10. Comment (Richards/Watson/Gershon, February 10, 2004):

Objection of City of Temecula to conducting hearing on Tentative Order No. R9-2004-001 as in informal proceeding and request to permit cross examination of witnesses.

Response:

The Regional Board responded to this objection at the February 11, 2004 public hearing. Procedures for requesting a formal hearing were specified in the public notice, which was mailed to interested parties and posted on the SDRWQCB web site on December 15 as well as published in the Riverside Press Enterprise on December 20. The request/objection from Richards/Watson/Gershon on behalf of the City of Temecula was not submitted in accordance with the procedures. However, the Regional Board agreed to allow the functional equivalent of cross-examination at the February 11 meeting.

11. Comment (Verbal – David Hogan, City of Temecula):

When we had a public workshop here a few weeks ago, I was a little distressed to hear from the staff that none of the public comments that were provided when they were talking about this permit were going to be presented to the Board for their information in this decision-making process. I found that to be a little alarming as an attitude that you go out to meet the community, yet nothing that's said there is going to be heard or considered by the Board in making their decision.

Response:

The agenda for the January 23, 2004 public workshop clearly stated that the purpose of the meeting was to inform the public of what the permit will require of industrial and commercial businesses, new development and construction activities, and municipal departments. As part of the workshop, the Permittees presented their assessment of potential consequences of the permit on the public. The purpose and structure of the workshop was designed for interested persons to obtain the information necessary to provide informed comments into the process. At the workshop, SDRWQCB staff provided comment cards and stated repeatedly that in order for comments to be included in the administrative record, they must be written on the cards or submitted in writing prior to the close of the comment period. No cards were submitted during or after the workshop.

12. Comment (Richards/Watson/Gershon, February 5, 2004):

The USC Study, "An Economic Impact Evaluation of Proposed Storm Water Treatment for Los Angeles County", should be considered and included in the record.

Response:

The USC study has been considered by the SDRWQCB and is part of the record. The USC study is based on the construction of a regional treatment facility for advanced treatment of urban runoff. The tentative Order is BMP-based and focuses on pollution prevention and source control for the most cost-effective reduction of pollutants. The tentative Order does not require, in fact it discourages, the use of end-of-pipe advanced treatment of urban runoff.

13. Comment (District, March 10, 2004):

The Permittees serve the same citizens of California as the Board. It is to our mutual benefit – and the benefit of these citizens, to develop a permit that is protective of receiving waters in a manner that is cost-effective, and appropriate for the water quality conditions of the Santa Margarita Region.

Response:

Comment noted.

14. Comment (Verbal – Evan McGinley, Richards/Watson/Gershon):

The nature of the tentative Order when it resembles the permits that have been applied and adopted in south Orange County as well as San Diego County resembles a rule of general application.

Response:

The tentative Order resembles the MS4 permits that have been issued to San Diego County and south Orange County, as well as Los Angeles County, northern Riverside County, and many other municipalities in California. All of these MS4 permits were designed to implement the federal NPDES Phase I storm water regulations, therefore, resemblance is expected. Within the framework of the tentative Order, which is the minimum necessary to meet the MEP standard and comply with the federal regulations, the Permittees have significant opportunity and flexibility to develop and implement their own unique programs and BMPs.

Adoption of the tentative Order cannot be construed as adopting a “regulation” or “rule” and is clearly a permit. The tentative Order having similar or consistent requirements within the San Diego Region does not trigger a rule of general application. None of the applicable statutes or regulations precludes the SDRWQCB from incorporating findings or requirements in a manner that ensures consistency.

15. Comment (District, January 28, 2004):

The Tentative Order proposes requiring the Permittees to implement new and expanded compliance programs. Implementation requires five steps:

- 1) Review existing programs for compliance with the Tentative Order.
- 2) Revise or create compliance programs for areas that are found deficient.
- 3) Identify funding and staffing needs and sources.
- 4) Revise and adopt ordinances to require the implementation and enforcement of the additional and expanded compliance programs and ensure that violations of the ordinances can be enforced by sanctions.
- 5) Have city attorney/County Counsel certify that their respective local government agency has the authority to implement and enforce the compliance requirements.

The new and expanded compliance programs must be developed, implemented and codified within 365 days of adoption. Further, the Tentative Order requires city attorneys and County Counsel to certify that their ordinances include provisions for sanctions to enforce compliance programs mandated by the Order within 365 days of adoption. Grading ordinances must be revised within 180 days of adoption.

The compliance schedule proposed in the ROWD is protective of receiving waters. In the ROWD the Permittees committed to review their ordinances within 6 months of permit adoption, and as necessary, revise these ordinances and certify legal authority within 18 months of permit adoption. This schedule was based on the continued countywide implementation of programs developed in the Santa Ana Region and a reasonable use of Permittee resources. Justification was not provided to describe why the compliance programs and schedule proposed in the ROWD would not be protective of water quality and what benefits would be realized in the Santa Margarita Region by the compliance requirements and accelerated implementation schedule proposed in the Tentative Order. Lacking such justification, the Permittees cannot justify use of emergency procedures to meet the specified compliance schedule.

The compliance schedule proposed in the tentative Order will not provide additional water quality benefits. No justification is presented to support the compliance schedule proposed in the Tentative Order or to justify why the schedule proposed in the ROWD is not protective of water quality in the Santa Margarita Region. The justification is not, and the Permittees maintain cannot, be based on a credible threat to water quality or public health and safety in the Santa Margarita Region.

The compliance schedule proposed in the tentative Order fails to consider local processes. Section E.2 of the Fact Sheet asserts that the implementation schedule proposed in the tentative Order is practicable based on:

- Compliance with a one-year schedule by MS4 Permittees in San Diego and Orange Counties.
- Regional Board staff communications with Permittee staff.
- Available models that can be used as examples.
- The requirements are based on established regulatory requirements.

The Tentative Order reflects a lack of recognition to local differences in the procedural requirements associated with development and implementation of programs by the Permittees. The local schedule constraints were documented and presented to Regional Board staff by the Permittees prior to issuance of the Tentative Order. These procedural requirements and constraints provide for data gathering, program development, public involvement, Permittee budgetary processes, State procedural requirements for ordinance adoption, compliance with internal procedures and other practical considerations. In order to revise ordinances and certify legal authority within the prescribed timeframe, the ordinance revisions may require the implementation of emergency action processes that bypass public notice and comment procedures that are reserved for identified threats to public health and safety. Permittee staff acknowledges that Regional Board staff have communicated their desires and expectations regarding the proposed requirements of the Tentative Order. However, Permittee

staff cannot respond to Regional Board staff desires in the same manner as private sector organizations. Permittee staff, like Regional Board staff, cannot commit public resources to initiate changes in District, County or City policy and programs without approval from their respective Boards. Such approval requires clear justification based on specific requirements, i.e., adoption of Permit requirements. Further, in the dialogue with Regional Board staff the Permittee staff provided documentation that the existing program is effective and that the imposition of exceptionally stringent requirements developed for San Diego and Orange Counties is not warranted. Therefore, although the Regional Board and Permittee staffs were engaged in a dialogue, this did not provide additional "lead time" that would reduce the time needed for development of compliance programs.

The Permittees are aware of and have reviewed many models developed to address urban runoff management that can be considered in the development of compliance programs in the Santa Margarita Region, including those referenced by Regional Board staff. However, the Santa Margarita Region, like other areas covered by MS4 permits, is unique. Although models can be used as general guidance, the compliance program must be tailored to the unique water quality conditions and characteristics of the Santa Margarita Region. If this were not the case, a statewide, or even a nationwide permit and compliance program would be appropriate.

The Permittees agree that the regulatory requirements have not changed since issuance of the Phase I regulations in 1990. The existing compliance program, which is responsive to the MS4 permit issued by the San Diego RWQCB and USEPA Region IX, is in compliance with these regulatory requirements and is protective of water quality. As noted elsewhere in our comments, the compliance programs have been notably effective. Therefore, there is no justification for the imposition of new and expanded compliance requirements on such an accelerated schedule.

The compliance schedule proposed in the tentative Order fails to consider cost impacts. To determine the impact of the accelerated implementation schedule proposed in the Tentative Order, the Permittees have reviewed their administrative, technical and fiscal resources and existing compliance programs. These analyses have determined that the Permittees could not reasonably implement this program within the prescribed compliance schedule with available staff resources. To meet the compliance schedule the Permittees would be required to hire consultants and authorize overtime to assist in expediting development and implementation of the proposed compliance programs. Additionally, the schedules do not recognize that the Permittees will need to rely on the same staff resources to develop a number of expanded and new MS4 permit compliance programs simultaneously. This would significantly impact local resources that must also fund basic public services (fire, police, libraries, etc.). Further, during this period the District and County are also being required to develop and implement compliance programs responsive to MS4 permits issued in the Santa Ana and Colorado Regions, and the City of Murrieta must develop and implement compliance programs in the Santa Ana Region. Significant public resources could be saved without impacting water quality by revising the Tentative Order's implementation schedule.

The accelerated compliance schedule is inappropriate, wasteful of public resources and unnecessary for water quality protection. The Permittees have proposed a revised compliance

schedule based on the requirements in the Tentative Order and the Permittees' fiscal and administrative analysis of internal procedures. The proposed implementation schedule would:

- With exception of the SUSMP, develop the required programs within 365 days of permit adoption.
- Compliance programs that do not require ordinance revision would be implemented within the 365-day period.
- Produce the Individual and Watershed SWMP documents, including the SUSMP, within 640 days of the Tentative Order adoption.
- Certify legal authority and implement remaining programs within 640 days of Tentative Order adoption.

The Permittees believe that the proposed implementation schedule is reasonable, is protective of water quality, and responsibly uses fiscal and administrative resources. It also allows for deliberate development of compliance programs and opportunities for public review and comment of proposed ordinances and compliance programs. The Permittees request that the Regional Board revise the compliance schedule based on our recommendations or provide the Permittees with a cost-benefit analysis to support the Tentative Order's existing implementation schedule.

Response:

As discussed in Section E of the Fact Sheet, the compliance schedule proposed in the tentative Order is both necessary and feasible.

First and foremost, in accordance with 40 CFR 122.26(d)(2)(iv)(A) – (D), the Permittees should have developed a comprehensive storm water management program (SWMP) as part of their application for permit renewal. In various correspondence, beginning in July of 2002, the SDRWQCB provided the Permittees with specific information that should have been addressed in the management plan to be submitted as an application. The Permittees disregarded these requests for a detailed management plan and submitted a ROWD, which stated that the DAMP would be revised within 18 months of permit adoption. The Permittees are now requesting additional time to conduct activities that should have been completed in November 2003. The SDRWQCB has essentially already provided them with an additional 365 days by allowing them this time after permit adoption to develop their SWMPs. Further additional time is unjustified.

Regarding ordinance review and updates, each Permittee adopted a comprehensive storm water discharge control ordinance pursuant to Order No. R9-98-02. The existing ordinances give the Permittees broad authority to prohibit discharges and require BMPs at existing and new developments. The existing ordinance may be adequate, and the neither the SDRWQCB nor the Permittees have determined that it would need to be revised to implement the tentative Order. Therefore, implementation could feasibly begin immediately, and there is no need for additional time to revise and update the storm water ordinance. Further, in the Permittees' proposed implementation schedule, they failed to identify the compliance programs that do not require ordinance revision for implementation. Without the identification of specific programs, the permit would be unenforceable until 640 days after adoption.

Secondly, 34 other permittees in the San Diego Region were given 365 days to develop and implement similar requirements. All of these permittees met the requirements in a timely

fashion. As stated in the Fact Sheet, according to the City of Escondido, the one-year schedule was reasonable, including the inter-departmental planning and review, public meetings, Planning Commission review and approval, and City Counsel approval. Escondido is not a "coastal city," and the referenced procedures are similar to those listed in the Permittees' comments. The Permittees have not proven that they are significantly different procedurally from the 34 other cities to warrant additional time. Providing the Permittees in Riverside County with additional time to implement similar requirements is unjustified and would constitute inconsistent regulation.

Thirdly, the County, the District, and the City of Murrieta have been reviewing and revising ordinances and programs to comply with the MS4 permit issued by the Santa Ana Regional Board, which is similar to the tentative Order. In accordance with the Santa Ana Board permit, the permittees must have ordinances updated by April 2004. Therefore, three of the 4 Permittees will have already completed the processes of reviewing and revising ordinances, as well as developing a SUSMP, before Order No. R9-2004-001 is even issued.

Fourthly, the rapid growth and development occurring in the area, which is the reason that the area was designated as needing a Phase I permit in the first place, provides justification for implementation of improved management programs as soon as possible, especially the post-construction requirements (SUSMP). New developments are rapidly occurring with little or no requirements for control of storm water quality or quantity. The Permittees are missing the unique opportunity to incorporate BMPs during the planning phase, which is much more cost effective than retrofitting to address problems later. For the protection of water quality, it is critical that the Permittees begin requiring post-construction BMPs sooner, rather than later.

Regarding the SUSMP timeline in the San Diego MS4 permit, the permittees were given 1 year to develop a model SUSMP, then 6 additional months for each permittee to tailor the model to their municipality and adopt and implement the appropriate ordinances. Considering the fact that various models exist, and that the Permittees have been developing similar requirements for the Santa Ana Regional Board, the permittees in the Upper Santa Margarita Watershed do not need an entire year to develop a model.

Finally, the tentative Order is based on federal NPDES regulations that have been in place since 1990. Although improvements are needed, it is expected that Permittees will build upon existing programs. It is not necessary or recommended that Permittees start over with program development. This is an ever-evolving program, and Permittees should be able to make improvements within the time provided.

Overall, in order to reduce pollutants in runoff to the MEP, the Permittees in the Upper Santa Margarita Watershed must implement improved programs as soon as possible. This is necessary to comply with the federal NPDES regulations and for the protection of water quality.

16. Comment (District, January 28, 2004):

The Permittees are implementing comprehensive storm water compliance programs that address all of the requirements of the federal regulations and the CWA. In adopting the current permit, the programs implemented by the Riverside County Permittees were determined by your Board and the USEPA as meeting the MEP standard of the CWA. The only change to the MEP standard since the adoption of the current permit has been the adoption of the SUSMP

requirements by the SWRCB. Our compliance programs, which have been featured in Stormwater Magazine, have expanded over the past five years. In our permit renewal application, we proposed a number of enhancements to our compliance program, including the addition of elements to specifically address the SUSMP requirement.

Response:

Although Order No. 98-02 may have been considered to meet the MEP standard in 1998, the MEP standard is dynamic and is reviewed as part of this renewal process. The federal NPDES regulations intended for subsequent rounds of MS4 permits to evolve with expanded and better-tailored BMPs (EPA 1996 – Interim Permitting Approach). The tentative Order builds upon programs that were established pursuant to Order No. R9-98-02 and contains more specific requirements in areas that were vague or not meeting the intent of what is not considered to the MEP standard of storm water management. By proposing “a number of enhancements”, the Permittees recognized that the programs implemented pursuant to Order R9-98-02 must be improved to achieve MEP. Many of the proposed “enhancements” were determined by staff to be consistent with measures identified in the tentative Order. Other “enhancements” were determined to be lacking or not proposed by the Permittees as part of their application. The tentative Order prescribes requirements in sufficient detail for the Permittees to develop and implement a program to satisfy the SDRWQCB definition of MEP for a third-term MS4 Phase I permit.

17. Comment (District, January 28, 2004 and March 10, 2004):

The existing DAMP and its supplements are effective and appropriate given the limited nature and significance of water quality problems associated with runoff from urban development in the permitted area and only limited modifications to the DAMP are justified.

This is exemplified by the existence of only one low priority impairment within the watershed. In contrast, the coastal counties have over 115 impairments – many of which are high priority (from verbal comments).

The compliance requirements proposed in the tentative Order will provide no additional water quality protection beyond the existing and proposed Permittee programs.

Response:

Compliance by the Permittees with the requirements of the tentative Order will facilitate and improve their program to reduce pollutants in discharges from their MS4s to the MEP. To date, the Permittees have not provided any evidence that the current program has been and will continue to be effective. As documented in the record¹ the Permittees have not been submitting any quantitative or qualitative information or made any attempt to measure program effectiveness in annual reports. Until the SDRWQCB issued an NOV in November 2002, the Permittees had not conducted any analysis of monitoring data to determine improvements or degradation of water quality. Recent Permittee annual reports document various persistent

¹ 1) SDRWQCB. April 17, 2002. Annual Reporting for Order No. 98-02. 2) SDRWQCB. November 6, 2002. NOV No. R9-2002-360. SDRWQCB Staff Review of the Riverside County, Santa Margarita Watershed MS4 2001-2002 Annual Report.

exceedances of urban runoff-related pollutants in wet and dry weather, with no indication of an improving trend. The data certainly do not support the Permittees' comment.

Furthermore, the DAMP is outdated and inadequate, and, as documented in the record², the current and previous efforts to control pollutants in storm water discharges do not constitute the MEP level of control. The DAMP was developed in 1993 and contains vague BMPs to be implemented through 1995. The DAMP was not revised during the previous permit cycle, as the Permittees proposed in their application, dated January 1995. Necessary revisions have never occurred, and, therefore, the constituents of the DAMP do not meet the MEP standard to which storm water management is held in other regions and counties. For example, the post-construction "guidelines" contained in Supplement A of the DAMP are not required, and the program evaluation conducted in November 2002 revealed that the permittees were typically not implementing them³. Although the DAMP may have been previously considered adequate to meet MEP, it is inappropriate to assert that a management plan designed to comply with the first-round Phase I permit continues to be adequate to meet the MEP standard. The federal NPDES regulations intended for first-round permits to establish basic requirements and evolve with expanded and better-tailored BMPs in subsequent permits.⁴

The 303(d) list is based on limited data from Camp Pendleton, the Department of Water Resources, Rancho California Water District and Regional Board grab sampling in June 1998.⁵ No wet weather or urban runoff monitoring data was available for review as part of the 2002 update of the 303(d) list because it was not available. Prior to the 2002 update, the Permittees' monitoring data was submitted as an average value for all sampling events at all stations. This manipulation of the data, as documented in the record⁶, was not useful or possible to analyze. It is probable that if Permittee monitoring data, which documents various persistent exceedances, had been reported appropriately for review as part of the 303(d) update, that additional constituents would be listed. The 303(d) update identified various other constituents of concern that could not be listed due to lack of available data. These constituents (sedimentation/siltation, iron, manganese, sulfate, and total dissolved solids) are listed on the Monitoring List.⁷ In addition to the 303(d) list, various other data sources exist that indicate potential water quality problems in the Santa Margarita Watershed (see response to Comment Nos. 33 and 34).

Overall, this comment is not supported by available data.

18. Comment (Verbal – Steve Stump, District):

² 1) SDRWQCB. November 6, 2002. NOV No. R9-2002-360. 2) SDRWQCB. December 11, 2002. Riverside County (Santa Margarita Watershed) MS4 Program Evaluation Report (Order No. 98-02, NPDES Permit No. CAS010766).

³ SDRWQCB. December 11, 2002. Riverside County (Santa Margarita Watershed) MS4 Program Evaluation Report (Order No. 98-02, NPDES Permit No. CAS010766).

⁴ EPA. 1996. Interim permitting approach for water quality effluent limitations in storm water permits. Fed. Reg. Vol. 61, No. 166.

⁵ SDRWQCB. March 19, 2002. Fact Sheets in Support of Draft Clean Water Act Section 303(d) List of Impaired Waters 2002 Update.

⁶ SDRWQCB. April 17, 2002. Annual Reporting for Order No. 98-02.

⁷ SWRCB. 2002. Monitoring List 2002

Only one 303(d) listed impairment exists and the 303(d) list is based on a large body of data, including data collected by Rancho California Water District, Camp Pendleton, Fallbrook Public Utilities District, RCFCWCD MS4 monitoring data, Mission Resource Conservation District, Eastern Municipal Water District and United States Geological Survey.

Response:

This comment is not accurate. For Murrieta Creek, Temecula Creek, and the Santa Margarita River, the 303(d) list is based on the following data sources:

- Camp Pendleton – quarterly samples collected from 1997-2000;
- Department of Water Resources – collected from May 1998-November 2000;
- Rancho California water District receiving water monitoring; and
- SDRWQCB grab sampling in June 1998.

As discussed above in response to Comment No. 17, the single 303(d) listing is not evidence that no other water quality problems exist.

19. Comment (VERBAL - DUSTY WILLIAMS, DISTRICT):

The Permittees have continued to improve the DAMP.

Response:

There is nothing in the record to support this statement. The DAMP was written in 1993 and contains vague BMPs to be implemented through 1995. The DAMP was not revised during the previous permit cycle, as the Permittees proposed in their application, dated January 1995. Necessary revisions have never occurred, and, therefore, the constituents of the DAMP do not meet the MEP standard to which storm water management is held in other regions and counties.

20. Comment (VERBAL - DUSTY WILLIAMS, DISTRICT):

There is no actual water contact recreation in Riverside County and water contact recreation is not affected by runoff.

Response:

The District has submitted no documentation to support the statement that there is no water contact recreation (REC1 beneficial use) in the area. At the February 11, 2004 Board Meeting, SDRWQCB staff showed photographs of people swimming and rafting in the Santa Margarita River, documenting that the river is in fact used for water contact recreation. These activities may be affected by urban runoff from activities in the Upper Santa Margarita Watershed.

Furthermore, in addition to REC1, the watershed supports many other beneficial uses (REC2, MUN, AGR, IND, WARM, COLD, WILD and RARE) that the tentative Order is designed to protect. The following comment from the EPA⁸ emphasizes this need to protect all of the beneficial uses in the watershed: "We also disagree with a commenter who seems to feel that the monitoring should be scaled back since the storm water discharges are not necessarily impacting areas used for water recreation (as is the case for other Southern California MS4s). However, we

⁸ EPA. Doug Eberhardt, Manager, CWA Standards and Permits Office. March 5, 2004. Comments on Tentative NPDES Permit No. CAS0108766 for Riverside County and Co-Permittees.

believe that protecting the important aquatic resources of the Santa Margarita River and its tributary streams provides a full justification for the monitoring program.”

21. Comment (District, January 28, 2004):

In reviewing the tentative Order, we are asking the same questions that we expect the Board of Supervisors, City Councils and the citizens to ask as authorization and funding for implementation of the proposed new and expanded programs is requested, including:

- What are the problems associated with runoff from urban development in the Santa Margarita Region to be addressed by the new and expanded compliance requirements proposed in the tentative Order?
- What existing programs address these problems?
- Are existing programs to manage runoff from urban developments in the Santa Margarita Region effective? If these existing programs are not effective, what specifically needs to be done to improve their effectiveness?
- What new and expanded programs to control urban runoff quality are being proposed in the tentative Order and why are they needed?
- Will the new and expanded programs proposed in the tentative Order solve or even affect the water quality problems associated with runoff from urban development in the Santa Margarita Region?
- How will these new and expanded programs to control runoff from urban development in the Santa Margarita Region be funded (federal/state funding, permits/fees, special assessments, general fund)? Will the demands of new and expanded compliance requirements impact the resources needed to maintain local services and facilities?
- What is the schedule for implementing the proposed compliance requirements? Are the Permittee procedural constraints recognized in the schedule? Are existing funding, staffing and other resources sufficient to meet the compliance schedules? If not, are the processes needed to obtain additional resources factored into the schedules? How does the proposed schedule tie into other efforts in the watershed?
- How will we know if the permit requirements have addressed the identified problem(s), if any, associated with runoff from urban developments in the Santa Margarita Watershed? Who will measure our progress and make such a determination?

Response:

Many of these important questions are answered throughout the Fact Sheet. The document discusses pollutants in urban runoff, existing and proposed programs to address urban runoff, implementation schedules, legal citations and justifications for all proposed requirements. The SDRWQCB, however, cannot answer all of the above questions on behalf of the Permittees. Questions regarding how programs will be implemented, funded, and assessed are the Permittees' responsibility to answer. For example, the federal NPDES regulations require the Permittees to develop methods to assess program effectiveness [40 CFR 122.26(d)(2)(v)] and to describe the source of funds to meet the necessary expenditures [40 CFR 122.26(d)(2)(vi)]. According to EPA guidance (EPA, 1992a), before applicants proceed with detailed development of their programs, they should recognize the following fundamental requirements:

- Who or what are the primary contributors of pollutants in storm water discharges from MS4s?

- Where are these sources of pollutants located?
- What is the magnitude of these pollutant sources and their potential impact on receiving waters?
- How does the municipality plan to reduce or eliminate the contribution of pollutants in storm water discharges?
- Why did the municipality select the BMPs it proposes?
- How will the municipality assess the effectiveness of the program? What criteria or measures will apply?
- How will the municipality fund proposed programs?

Considering that the Permittees are entering the third permit term and have been conducting water quality monitoring for over 10 years, they should be able to provide answers to these important questions to their decision makers and their public.

22. Comment (District, January 28, 2004):

The single water quality impairment in the Santa Margarita Region identified by the Regional Board in the 2002 California 303(d) List and TMDL Priority Schedule is for phosphorous. However, the Basin Plan objective for phosphorous is set so low that even background conditions unaffected by urban or agricultural development exceed this limit. New and expanded requirements will not address the impairment.

Response:

The Permittees have not submitted data or documentation to support this comment. Instead, they have submitted information that contradicts this comment. The Permittees' *Analysis of Receiving Water Quality within the Santa Margarita River Watershed*, submitted on December 6, 2002 states that "Many of the Total Phosphorus concentrations were measured at or below the Basin Plan objective (0.1 mg/l)." This information indicates that the Basin Plan objective for phosphorus is not set lower than background conditions.

The permit is designed so that Permittees can select BMPs to specifically target potential sources of phosphorus, such as residential and commercial landscaping. As stated in EPA's comments regarding this contention, the BMPs required by the permit (i.e., pollution prevention, education, and inspections) should help reduce phosphorus discharges.

23. Comment (EPA):

A commenter contended that it may not be possible to attain the total phosphorus objective of 0.1 mg/l with conventional technology. The commenter pointed to a recent article in The Practice for Watershed Protection, which suggested that "irreducible concentrations" may exist for storm water treatment technologies such as ponds and wetlands and that the phosphorus objective of 0.1 mg/l may not be attainable. The commenter then suggested that many of the new permit requirements would not be appropriate as a result.

We would disagree with the commenter on this matter. While there may be limitations regarding some storm water treatment technologies (such as ponds and wetlands), the permit requires other types of BMPs (such as inspections and education of facilities using fertilizers) which should

help reduce phosphorus discharges to the receiving water and help to minimize potential impacts to the receiving waters. As such, we believe these BMPs should be worthwhile.

Response:

Comment noted

24. Comment (Verbal – Dan York, City of Murrieta):

We request a reassessment of water quality objectives that are known or likely to be influenced by natural or ambient conditions (phosphorus) to the extent that regulation of human activities measurably and usefully foster reasonable water quality protection. We request that the State secure funding, conduct ambient water monitoring, determine effluent limits and pollutants standards based on quantitative and qualitative data.

Response:

These comments/requests cannot be addressed through the MS4 permit renewal process. It is an issue that, if determined necessary, would be addressed through the triennial review of the Basin Plan.

25. Comment (District, January 28, 2004):

Tentative Order No. R9-2004-001 finds that urban runoff can carry pollutants that can cause, or threatens to cause, a condition of pollution or nuisance (as defined in CWC Section 13050) in receiving waters. The Tentative Order further finds that Permittees cannot "passively" accept pollutant-laden discharges from third party sources into their MS4s. The Tentative Order then prohibits discharges into an MS4 that causes, or threatens to cause, a condition of pollution, contamination or nuisance (as defined in CWC Section 13050), in waters of the State. Pollutant-laden discharges from third parties can come from many different sources, both within and outside of the authority of the Permittees to control. As the Tentative Order is currently written, a discharge source outside of the Permittees' authority that causes, or threatens to cause, a condition of pollution, contamination or nuisance (as defined in CWC Section 13050), in waters of the State, could place the Permittees in a position of unavoidable non-compliance with the requirements of Tentative Order R9-2004-001. This condition would also exist should the discharger refuse Permittee requests to voluntarily cease the discharge. Permittees will comply with the requirements of the Tentative Order relative to the subject of non jurisdictional discharges as referenced in the procedure outlined below, subject to the authority and limitations imposed by federal and state law (including, but not limited to, the United States and California constitutions, Title 33 U.S.C. Sections 1251 et seq., California Water Code Sections 13000 et seq., statutory and decisional law relating to drainage, water rights and water quality).

Regional Board staff have suggested that the Permittees develop a proposed amendment to the existing DAMP whereby a procedure is established to address non jurisdictional discharges that causes, or threatens to cause, a condition of pollution, contamination or nuisance in waters of the State. This procedure would be credited in the Findings of the Tentative Order as meeting MEP with regard to discharges from third party sources outside the jurisdiction of the Permittees. The procedure would ensure that the Permittees are taking an active role in promoting water quality management throughout the Santa Margarita Region, not just in areas under their jurisdiction.

A procedure to address non jurisdictional discharges is hereby submitted as an amendment to the DAMP.

Finding 18 of Tentative Order R9-2004-001 [Finding No. 20 of revised tentative Order] states:
"As operators of the MS4s, the Permittees cannot passively receive or discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control. These Discharges may cause or contribute to a condition of contamination or exceedances of receiving water quality objectives."

Provision A. I of Tentative Order R9-2004-001 states:

"Discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC Section 13050), in waters of the state are prohibited."

The following procedure describes an approach to address non jurisdictional discharges into the MS4s owned and operated by the Permittees:

The Permittees lack legal jurisdiction over discharges into their respective MS4s from agricultural activities, California and federal facilities, utilities and special districts, Native American tribal lands, and other point and non-point source discharges otherwise permitted or approved by the Regional Board. If the Permittees' Illicit Connection/Illegal Discharge (IC/ID) Detection and Elimination Program or Receiving Waters Monitoring Program identifies non jurisdictional discharge causing, or threatens to cause, a condition of pollution, contamination or nuisance (as defined in CWC Section 13050), in waters of the State, the following minimum guidelines will be followed:

- 1) The Permittees will document the non jurisdictional discharge.
- 2) When appropriate, collect samples of the non jurisdictional discharge.
- 3) In emergency situations, the Permittees will utilize the Hazardous Materials Emergency Response Team and coordinate with the Office of Emergency Services and the San Diego Regional Board to control the impact of the non jurisdictional discharge on MS4s and receiving waters.
- 4) The Permittees will notify the discharger verbally, at minimum, of their illegal discharge and the impact on receiving waters and provide appropriate educational materials.
- 5) If necessary, the Permittees will contact the appropriate enforcement agency and/or the San Diego Regional Water Quality Control Board to notify them of the nonjurisdictional discharge causing, or threatening to cause, a condition of pollution, contamination or nuisance, in waters of the State.
- 6) Permittees will notify the responsible entity of the availability of technical assistance and provide guidance in seeking grants and other assistance to address the nonjurisdictional discharge.

The Permittees will, as appropriate, participate in watershed management efforts with other Federal, State, regional, local agencies and other watershed stakeholders to address stormwater quality issues within the watershed.

Response:

The proposed procedure to address non-jurisdictional discharges into the MS4 described in the January 28 comment letter appears to meet the expectations of the tentative Order and should be included in each Permittee's SWMP.

26. Comment (District, March 10, 2004):

The Tentative Order is subject to restraints imposed by drainage law principles applicable to both public and private property owners. The Regional Board offers the view that the Permittees, in their capacity as operators of the MS4s are in a position to refuse free and open access to their MS4s by upstream third parties that may be discharging pollutants (hidden or otherwise) into the MS4 system. See Finding No. 18 [Finding No. 20 in the revised tentative Order], Sections A and B of the Tentative Order. This position is contrary to drainage law that has developed in California and in most jurisdictions across the United States. *See District, March 10, 2004 comment letter for entire text of comment.*

Response:

As discussed in Section V.B of the Fact Sheet, Permittees are responsible for reducing pollutants in all discharges from their MS4s to receiving waters to the MEP, regardless of the origination of the pollutants. The tentative Order does not require the Permittees to refuse access to the MS4s by upstream third parties, it requires that pollutants in the discharges be reduced to the MEP prior to their discharge to receiving waters. In order to ensure that pollutants in discharges from third parties are reduced to the MEP, a Permittee may prohibit or control discharges into its system or ensure that pollutants are treated or removed prior to discharging to receiving waters. The tentative Order does not require drainages to be blocked or discharges to be rejected. It, therefore, does not conflict with "drainage law principles".

It should be noted that in Comment No. 25 the Permittees state that they will comply with the Finding No. 18 (Finding No. 20 in the revised tentative Order) and Prohibition A.1 of the tentative Order. The Permittees provided a proposed procedure to address discharges of pollutants from third parties outside of their jurisdictions. The SDRWQCB has responded that the proposed procedure would meet the expectations of the tentative Order. The term "drainage law principles" was not raised as an issue in the Permittees' proposed procedure.

27. Comment (District, January 28, 2004):

Urban development is a minor land use in the Santa Margarita Region. Although portions of the Santa Margarita Region are experiencing rapid growth, 94 percent of the watershed is comprised of non-urban (rural residential, agriculture, state lands, federal lands, and tribal lands) land uses. It is projected that the population of Riverside County will increase approximately 20 percent by 2010. Assuming that the urbanized area increases proportional to population, 93 percent of the watershed would remain in non-urban land uses in 2010. As a result, runoff from urban development is only a minor component of the storm flow received by the Santa Margarita River. The current and projected storm flows in the Santa Margarita River are less than under natural conditions due to the construction and operation of Diamond Valley Reservoir, Lake Skinner and Vail Lake. Over 50% of the Santa Margarita River watershed has been controlled by the construction of Vail Dam in 1949 and Skinner Reservoir in 1974, which created significant storage capacity in the upper watershed. Due to this storage capacity, peak flow rates

during major flow events for both existing and future land use conditions will be lower than under natural conditions (assuming average storage conditions in the reservoirs). Further, the areas of the Santa Margarita Region that receive the most precipitation are controlled by Skinner and Vail Lakes.

Response:

The Permittees have not identified the relative pollutant loading from urban development in the watershed. Although urban development may comprise a lesser portion of the total watershed area, the pollutant loading from urban development may be more significant in comparison to the loading from the rest of the watershed, especially considering that over 50% of the watershed (including much of the undeveloped areas) is controlled by Vail and Skinner reservoirs. In any event, the tentative Order allows flexibility for the Permittees to prioritize areas and activities for management actions, and it is expected that programs will be focused on the urbanized and developing areas. However, the Permittees are responsible for reducing pollutants in runoff to the MEP from all areas of the watershed under their jurisdiction.

Overall, the percentage of urban development in the permitted area is not relevant to permit conditions. This comment does not address specific permit requirements and does not provide justification for any changes.

28. Comment (District, January 28, 2004):

Non-storm runoff from urban development is not a water quality problem. Runoff from urban development is not a contributor to water quality and quantity in the Santa Margarita River during non-storm conditions. With the exception of rising groundwater and water in the lowest reaches of Murrieta and Temecula Creeks and deliveries of imported water from the Rancho California Water District, there is no perennial flow to the Santa Margarita River from urban development in the Santa Margarita Region. During the majority of the year and throughout the nonstorm period, the entire system is essentially dry with the following minor exceptions:

- Flows resulting from springs in Redhawk and Warm Springs Creeks each of which infiltrate within a few feet of entering Temecula and Murrieta Creeks, respectively.
- Intermittent, low-volume discharges of non-storm runoff from urban development. These flows infiltrate rapidly, so there is no contiguous flow to the Santa Margarita River. However, even if contiguous flow did occur, these flows would not result in significant pollutant loading to the Santa Margarita River.
- The most significant non-storm discharges in the watershed consists of raw water supply well blow off which is allowed by the Regional Board.

Response:

First, the fact that many dry weather discharges infiltrate before reaching the Santa Margarita River does not mean that urban runoff is not a threat to water quality. The comment attempts to establish that the Santa Margarita River is the only water body in the watershed with beneficial uses that must be protected. However, every tributary to the river has its own unique beneficial uses and pollutants in discharges flowing into these waters must be reduced to the MEP, regardless of whether or not they infiltrate shortly after discharge. Considering the use of local water for municipal and domestic supply, the protection of ground water quality should be a

priority for the Permittees. As stated in a *Watershed Protection Techniques* article, “the quality of both surface water and groundwater in urbanizing areas of arid and semi-arid regions of the southwest is strongly shaped by urbanization.”⁹ According to the EPA, storm water discharges have been identified as one of the most prevalent possible contaminating activities for drinking water sources.¹⁰ Small amounts of some substances known to be present in urban runoff (heavy metals, pesticides and fecal coliform) may cumulatively degrade an aquifer, and the percolation of contaminated runoff can cause unacceptable consequences to ground water resources¹¹. Protection of groundwater resources is necessary to protect the MUN and other beneficial uses of the entire watershed.

Second, the Permittees have not submitted documentation to support this comment. SDRWQCB field staff have photo documentation of numerous dry weather flows throughout the permitted area. The *Santa Margarita Watershed Supply Augmentation, Water Quality Protection, and Environmental Enhancement Program Phase 3A Final Report*¹² finds that the increase in dry weather runoff from the urbanized portion of the Upper Santa Margarita Watershed has increased enough from historical flow to cause the Santa Margarita River Watershed Model to under predict flow during dry periods. According to the report, dry weather flows are significant enough to develop a dry weather runoff module to include runoff from urban areas. Further supporting that urban runoff is a problem, the Permittees’ own monitoring data document that discharges of wet and dry weather runoff at all sampling locations (ranging from MS4 outfalls to receiving water stations in lower Murrieta and Temecula Creeks) have persistently exceeded water quality objectives.

Lastly, the CWA and NPDES regulations apply to all Phase I MS4s, regardless of the number or type of water quality impairments that exist. As discussed in Section VI of the Fact Sheet, the fact that urban runoff contains a variety of pollutants that degrade water quality is widely documented throughout the nation, state and region. It is not required or necessary for the permitting authority (SDRWQCB) to prove that specific problems exist in specific areas to issue an NPDES permit.

29. Comment (San Diego Bay Council):

The Regional Board must recognize the significant problem in Riverside County. Our representative at the recent hearing was dismayed at the amazingly poor understanding of urban runoff issues demonstrated repeatedly by the Co-permittee representatives. Claims that there was no urban runoff in dry weather, that discharge of polluted flows into tributaries or ephemeral streams was of no concern, that no water contact is occurring in the Santa Margarita River, and that somehow Riverside parking lots and RGOs do not concentrate pollutants as they do everywhere else in the world indicate the need for substantially more oversight on the part of the Regional Board. It is also clear that there is a dire need for additional monitoring of this region—an issue that will be addressed by the permit renewal.

⁹ Stormwater Strategies for Arid and Semi-Arid Watersheds. *Watershed Protection Techniques*. 3(3): 695-706.

¹⁰ EPA. Municipal Storm Water and Ground Water Discharge Regulations in California. F-909-04-004. March 2004.

¹¹ EPA. Municipal Storm Water and Ground Water Discharge Regulations in California. F-909-04-004. March 2004.

¹² United States Bureau of Reclamation Southern California Office. Phase 3A Final Report: Santa Margarita Watershed Supply Augmentation, Water Quality Protection, and Environmental Enhancement Program. December 2003. Prepared by CDM Federal Programs Corporation for the U.S. Bureau of Reclamation.

Response:

Comment noted.

30. Comment (District, March 10, 2004):

The only area that can support REC1 beneficial uses is the Santa Margarita River. However, flows in this area consist of imported water and rising groundwater – not urban runoff.

Response:

There are many other beneficial uses designated for the waterbodies throughout the Santa Margarita Watershed, which the provisions of the tentative Order intend to protect. The designated beneficial uses are established for the Santa Margarita River and its tributaries. Regardless, during storm events, as well as through surface/ground water interaction, pollutants in urban runoff reach receiving waters with designated beneficial uses that must be protected by reducing pollutants in discharges from MS4s to the MEP.

31. Comment (San Diego Bay Council):

The Santa Margarita Watershed, encompassing both the Riverside and San Diego Counties, provides critical habitat for several endangered species. In February 2001, the U.S. Fish and Wildlife Service designated eight counties in California, including Riverside and San Diego as critical habitat for the endangered species, the Arroyo Toad. Another endangered species, the steelhead trout, has been found in the Santa Margarita River. This Tentative Order will play a vital role in protecting this watershed. The watershed protection is not only essential in conserving the inland riparian habitat but also the ocean. Both the Pew Oceans Commission and the U.S. Commission on Ocean Policy stress the need to have sound watershed management programs to conserve the ocean natural resources.

Response:

Comment noted.

32. Comment (EPA):

Commenters have argued that urban runoff in this particular watershed does not pose a significant water quality problem, and that the permit requirements should be reduced accordingly. EPA's Phase II regulations do indicate that the actual impacts of the discharges may be considered by the permitting authority in determining MEP. However, we believe that the fact sheet and the findings for the permit adequately document existing water quality concerns in the watershed (and potential future concerns due to the rapid growth of the area) and that the permit requirements are appropriate for this area.

Response:

Comment noted.

33. Comment (District, January 28, 2004):

Water quality problems associated with urban development in other areas [of the San Diego Region, State, and country] that are cited in the Fact Sheet are not problematic here. This illustrates the unique watershed characteristics in the Santa Margarita Watershed and the effectiveness of the existing compliance programs implemented by the Permittees.

Response:

The Permittees have not submitted documentation to support this comment. As discussed in response to Comment Nos. 34 and 35, various urban runoff-related water quality concerns exist in the Santa Margarita Watershed and monitoring data provided to date are inconclusive about the effectiveness of Permittees' programs to protect water quality and to reduce pollutants in runoff to MEP.

34. Comment (Verbal – David Hogan, City of Temecula):

We hear today – that list of stuff [tables of potential water quality problems and exceedances reported in Permittee monitoring reports that were presented at the February 11, 2004 SDRWQCB Meeting] appeared on the board. We've never seen it. I've never seen any studies that say this is a problem. And it goes through a long list of potential water quality problems, basically any pollutant that's ever been identified anywhere in any place at any time is all thrown in this big bundle and they try to say it's a problem here. I'm not sure that's valid, and I'm not sure that's legally defensible.

35. Comment (Verbal – John Harris, Richards/Watson/Gershon)

With respect to the slide [table of exceedances reported in Permittee monitoring reports that was presented at the February 11, 2004 SDRWQCB Meeting] we would like clarification on the list of contaminants. Are they a whole suite of contaminants that are tested for, or have they been identified as contaminants that exceed water quality objectives in any of the water bodies that we're concerned with, and what is the connection between those contaminants and urban runoff?

Response to Comment Nos. 34 and 35:

The information presented at the February 11, 2004 Board Meeting regarding water quality concerns in the Santa Margarita Watershed is discussed below.

First, it should be re-emphasized that the federal Clean Water Act and NPDES regulations apply to all Phase I MS4s, regardless of the number or type of water quality impairments that exist. As discussed in Section VI of the Fact Sheet, it is widely documented that urban runoff contains a variety of pollutants that degrade water quality throughout the nation, state and region. It is not a requirement for the SDRWQCB to prove that runoff from the Permittees' jurisdictions is causing specific problems in the Santa Margarita Watershed to issue this NPDES permit.

Specifically, various sources of data from the Santa Margarita Watershed document the increasing water quality problems and concerns in the area. Table 1 lists existing and potential problems and the sources that have identified these problems. Even the Riverside County General Plan recognizes that pollution from urban runoff is a concern.

Table 1. Water Quality Concerns

| Source | Existing or Potential Problem |
|---|--|
| SWRCB 303(d) List ¹³ | Listings: Phosphorus (Murrieta Creek and Santa Margarita River) Eutrophication (estuary) Concerns: sedimentation/siltation, iron, manganese, TDS |
| Riverside County General Plan ¹⁴ | Sediment from construction-related erosion; Pollution due to urban storm water runoff |
| San Diego County WURMP ¹⁵ | Eutrophication, nitrogen, phosphorus, diazinon, TDS, other toxic substances, trash |
| SDRWQCB Bioassessment Data ¹⁶ | Degraded biological and physical integrity |
| SDRWQCB, EPA Draft Operational Guidebook for reference based assessment ¹⁷ | Severe physical impacts (Excessive erosion, down cutting, sedimentation, etc.) from rapid and high volumes of urban runoff and a lack of effective runoff management practices |

The San Diego County's Watershed Urban Runoff Management Program (WURMP) for the Santa Margarita Watershed¹⁸ states that eutrophication (associated with low dissolved oxygen, and the presence of solids and excessive nutrients), toxic substances (trace elements and synthetic organics), diazinon contamination, and high levels of TDS are potential water quality issues in the watershed, and that these constituents of concern may have detrimental impacts to the beneficial uses. The WURMP prioritizes the problems based on potential beneficial use impairment (Table 2 below). The WURMP states that data is limited and further data collection and assessment should be made to substantiate concerns.

Table 2. WURMP Prioritization of Water Quality Problems¹⁹

| Constituents of Concern | Potential Beneficial Use Impairment | Priority |
|--------------------------------------|---|----------|
| Eutrophication, nitrogen, phosphorus | MUN, REC1, REC2, WARM, COLD, WILD, and RARE | High |
| Toxic substances – diazinon | WARM, COLD, WILD and RARE | Medium |
| TDS | MUN and AGR | Medium |
| Toxic substances – other | WARM, COLD, WILD and RARE | Low |
| Trash | REC1, REC2, WARM, COLD, WILD and RARE | Low |

¹³ SDRWQCB. 2003. Final 2002 Clean Water Act Section 303(d) List of Water Quality Limited Segments.

¹⁴ County of Riverside. October 2003. County of Riverside General Plan: Multipurpose Open Space Element. Chapter 5, OS-10.

¹⁵ County of San Diego. January 2003. Watershed Urban Runoff Management Program for the Santa Margarita Watershed. Table 4-5.

¹⁶ California Department of Fish and Game. 2002. SDRWQCB 2002 Biological Assessment Report: Results of May 2001 Reference Site Study and Preliminary Index of Biotic Integrity.

¹⁷ EPA. November 2003. Draft Operational Guidebook for reference based assessment of the functions of riverine waters/wetlands in the Santa Margarita Watershed, Riverside County. Chapter 4.

¹⁸ San Diego County. 2003. Watershed Urban Runoff Management Program for the Santa Margarita Watershed.

¹⁹ Table 2 was modified from Table 4-5 of the WURMP

According to the *San Diego Regional Water Quality Control Board: 2002 Biological Assessment Report*, based on data collected from 1998 – 2001, the bioassessment stations located in lower Murrieta Creek, lower Temecula Creek, and upper Santa Margarita River exhibited degraded biological and physical integrity (Index of Biotic Integrity (IBI) ranged from “Very Poor” to “Good”). As a comparison, the reference stations in the watershed, located in Sandia Creek and DeLuz Creek, were characterized by a high degree of biological and physical integrity (IBI was consistently “Very Good”). This data indicates that urbanization, not agriculture, is contributing to the impairment of the biological and physical integrity of the receiving waters.

The *Draft Operational Guidebook for reference based assessment of the functions of riverine waters/wetlands in the Santa Margarita Watershed, Riverside and San Diego Counties, California*²⁰ documents the physical impacts that have resulted from urbanization, including but not limited to:

- Temecula and Murrieta Creeks have been moderately to severely impacted by development and degradation of their watersheds. No hydrogeomorphic reference standard conditions were observed. Local effects are caused by **(a) massive earthwork associated with flood control projects, (b) channelization, (c) hardening of the channel bed and banks with concrete, rip-rap, etc., (d) rapid and high volume inputs of storm water runoff from impervious surfaces associated with urbanizing areas, (e) rapid and concentrated inputs of urban pollutants associated with untreated storm water, and (f) large accumulations of trash/debris.** “Currently, development pressures along the Temecula, Murrieta and Wilson Creeks are severe and apparently irreversible in the context of current land use practices and rates of urbanization.”
- **Storm water inputs from roads, yards, and parking areas tend to be direct, without benefit of oil-water separators, grit removal, or retention/detention of storm flows.** “The consequences of poor watershed, riparian, and channel management practices in agricultural and developing areas are clear.”
- **It is clear that Murrieta and Temecula Creeks are not performing hydrologic functions to their potential.** Specifically, given the urban setting of these creeks, the degree of development taking place within and near their floodplains, and **the current lack of effective stormwater management practices**, improvements in ecosystem functioning within these systems are likely to occur very slowly, if at all. **“Functional improvements in Murrieta and Temecula Creeks depend not only on changes in stream management techniques, but also upon BMPs throughout the upper watershed.”**
- “As a result of urban/suburban development, infiltration rates have decreased, peak flows have increased, and base flows have been diminished in both durations and volume”

²⁰ EPA. November 2003. *Draft Operational Guidebook for reference based assessment of the functions of riverine waters/wetlands in the Santa Margarita Watershed, Riverside County.* Chapter 4.

- “Significant impacts from erosion resulted from poor sediment and erosion control practices and/or development of impervious and smoothed surfaces in the contributing area.”
- **“Landscape-scale development in the Santa Margarita watershed appears to be causing main stem hydrologic and biogeochemical functions to degrade at unprecedented rates.”**

In addition to the sources discussed above, the Permittees have been conducting water quality monitoring pursuant to the MS4 permit since 1993. Although the program has many deficiencies²¹, the data shows various persistent exceedances of water quality objectives for urban runoff-related pollutants. Table 3 below lists the monitoring stations and the constituents for which multiple or persistent exceedances of water quality objectives have been reported.²² Due to inadequate monitoring and reporting, it was not possible to conduct a detailed analysis.

Table 3. Exceedances Reported in MS4 Monitoring Program

| Stn # | Station Name | Multiple or Persistent Exceedances of Water Quality Objectives ²³ (from 1993 – 2003) |
|-------|---------------------------|---|
| 188 | Cole Creek | Color, Total Nitrogen, Total Phosphorus, Iron, Manganese |
| 404 | Wildomar outlet | MBAS, Color, Total Nitrogen, Total Phosphorus, Fecal Coliform, Chromium, Iron, Manganese, Nitrogen-Nitrate, Ammonia, Odor, Thallium, Turbidity, pH, Antimony, Beryllium, Chlorpyrifos, Diazinon |
| 768 | Redhawk Channel | Boron, MBAS, Color, Total Nitrogen, Total Phosphorus, Fecal Coliform, Fluoride, Iron, Manganese, Nitrogen-Nitrate, Ammonia, Odor, DO, TDS, Sulfate, Turbidity, pH, Antimony, Beryllium, Chlorpyrifos, Diazinon |
| 769 | Empire Creek | Boron, MBAS, Color, Total Nitrogen, Total Phosphorus, Fecal Coliform, Chromium, Iron, Manganese, Nitrogen-Nitrate, Odor, DO (increasing trend), TDS, Thallium, Turbidity, pH, Antimony, Beryllium, Chlorpyrifos, Diazinon |
| 776 | Cal Oaks Channel (Line F) | MBAS, Color, Total Nitrogen, Total Phosphorus, Fecal Coliform, Chromium, Iron, Manganese, Nitrogen-Nitrate, Ammonia, Odor, TDS, Turbidity, pH, Antimony, Chlorpyrifos, Diazinon |
| 777 | Temecula Creek | Color, Total Nitrogen, Total Phosphorus, Fecal Coliform, Iron, Manganese, Nitrogen-Nitrate, DO, TDS, Sulfate, Turbidity, Antimony |
| 778 | Lower Murrieta Creek | Color, Total Nitrogen, Total Phosphorus, Fecal Coliform, Iron, Manganese, Nitrogen-Nitrate, Odor, DO, TDS, Sulfate, Turbidity, Antimony, Chlorpyrifos, Diazinon |

²¹ SDRWQCB. November 6, 2002. NOV No. R9-2002-360.

²² Permittee 2001-2002 and 2002-2003 Annual Reports.

²³ Does not include California Toxics Rule

| | | |
|-----|-------------------------------------|--|
| 779 | Upper Murrieta Creek | Color, Total Nitrogen, Total Phosphorus, Fecal Coliform, Iron, Manganese, Nitrogen-Nitrate, Ammonia, TDS, Turbidity, pH, Antimony |
| 828 | Santa Margarita River near Temecula | Color, Total Nitrogen, Total Phosphorus, Fecal Coliform, Chromium, Iron, Manganese, Nitrogen-Nitrate, Odor, DO, TDS, Turbidity, Antimony, Chlorpyrifos, Diazinon |

Table 4 below identifies potential sources of the pollutants that exceeded water quality objectives at the majority of the MS4 monitoring stations. This information indicates that urban runoff from construction, residential, industrial, commercial and municipal activities is contributing to degradation of water quality. Specifically, the data indicate potential illicit discharges from industrial and commercial activities, over-application of pesticides and fertilizers by residents and/or businesses, and sediment discharges from construction sites and/or eroding channels.

Table 4. Potential Sources of Pollutants²⁴

| Pollutant | Potential Sources |
|------------------|--|
| Antimony | Industrial activity |
| Chlorpyrifos | Organophosphate pesticide commonly used in residential areas |
| Chromium | Industrial activity (plating operations, manufacture of paints, dyes, explosives, ceramics, and paper) |
| Diazinon | Organophosphate pesticide commonly used in residential areas |
| Dissolved oxygen | Biodegradable organics, increased temperatures and salinity decrease dissolved oxygen |
| Fecal coliform | Bacteria originating from humans, animals, amphibians and birds |
| Iron | Industrial activity, acid mine drainage, corrosion from iron pipes and other material |
| Manganese | Industrial sources (manufacture of steel alloys, dry-cell batteries, glass and ceramics, paints and varnishes, inks and dyes, matches and fireworks and agriculture) |
| MBAS | Detergents typically associated with dry cleaners |
| Nitrogen | Excessive application of fertilizer in agriculture and urban areas, septic tank leachate |
| Phosphorus | Excessive application of fertilizer in agriculture and urban areas |
| PH | Industrial wastes can be strongly acidic, and laundry waste, and soda and sulfate-pump rinse water are alkaline wastes |
| Sulfate | Agricultural runoff, mining, tanneries, sulfate-pump mills, and other plants that use sulfates or sulfuric acid |
| Turbidity | Microorganisms, detritus, mineral substances, manganese |

²⁴ Potential source information from Permittee 2002-2003 Annual Report and County of San Diego, Watershed Urban Runoff Management Program, Santa Margarita Watershed.

| | |
|-----|---|
| | compounds, industrial wastes, and eroded soil and silt. |
| TDS | Urban runoff, imported water, irrigation practices |

Overall, the chemical, biological, and physical data and information described above indicate that urban runoff is causing degradation of the quality and the biological and physical integrity of the receiving waters in the Santa Margarita Watershed.

36. Comment (Verbal – David Hogan, City of Temecula):

We also heard staff talk about a sediment problem in the upper basin, and they referred back to 1993, which we got a heck of a storm. They use that as justification for why we have a sediment problem. Nothing in this program would have prevented anything other happening than what happened. I'm not sure that this statement that sediment is a problem up here is valid.

Response:

This comment is inaccurate. The SDRWQCB did not use a storm that occurred in 1993 as justification for a sediment problem in the Santa Margarita Watershed. Various sources, including the SWRCB Monitoring List and the Riverside County General Plan, list sediment as a water quality concern.

37. Comment (Verbal – David Hogan, City of Temecula):

There are very few water quality problems in the upper basin that are not quantity related. The permittees lack the ability to change the climate. The instream conditions are determined exclusively by rainfall.

Response:

There is no documentation in the record to support this comment. As discussed in response to Comment Nos. 34 and 35 above, various urban runoff-related problems exist.

38. Comment (Verbal – David Hogan, City of Temecula):

Last year the City of Temecula proposed some funding to do this type of analysis, to try to figure out what the problems were up here. As I understand it, both the state and the Regional Board weren't interested in figuring out if there's water quality problems in the upper basin. However, this year we have these terrible problems that require this prescriptive permit. I'm having a little trouble with the continuity of that.

Response:

The City of Temecula's proposal for Proposition 13 funding included mapping the City's storm drain system, monitoring for phosphorus, identifying sources of phosphorus, and developing a plan to reduce phosphorus. According to the SDRWQCB grant proposal review sheet, the proposed project did not rank high enough to receive funding. The fact that it would address a pollutant of concern in a 303(d) listed water body was listed as a strength. However, the following factors contributing to a lower score included: numerous omissions in the application form; lack of description of how it would build upon previous efforts; most of the proposed activities are generally required in MS4 permits; and lack of described changes in land use, BMP implementation and inspection/enforcement activities.

Typically, proposed projects that include implementation of activities related to permit requirements rank lower than proposals for projects that would not otherwise occur, such as restoration of impacted water bodies or riparian areas.

39. Comment (District, January 28, 2004):

Given the effectiveness of the existing program and other local, state and federal source control programs implemented in the Santa Margarita Region, no future water quality impairments associated with runoff from urban development are expected in the Santa Margarita Region. No future problems associated with runoff from urban development are expected as the SUSMP requirements specified in the Tentative Order require implementation of project specific controls. Further, with the increased control of pollutant sources that have resulted from increased regulation of hazardous materials, controls on the use of pesticides and the existing inspection and control programs implemented by the Permittees, no impairments of beneficial uses due to runoff from urban development in the Santa Margarita Region are expected in the future.

Response:

The Permittees have not submitted documentation supporting this comment. As discussed above in response to Comment Nos. 34 and 35, various urban runoff-related water quality concerns exist.

40. Comment (District, March 10, 2004):

The Permittees have been proactively addressing the impacts of growth by adopting the Western Riverside Multi-Species Habitat Conservation Plan (MSHCP), which will provide for conservation of over half the Riverside County portion of the Santa Margarita watershed. Coordination with the U.S. Army Corps of Engineers through the SAMP [Special Area Management Plan] is ensuring additional cohesive and integrated protections for waters of the U.S. The Riverside County General Plan provides additional protections to ensure that the Santa Margarita watershed retains its rural character by limiting urbanization and requiring that urbanized areas be clustered, as well as additional stringent new development controls. These efforts, taken independent of the tentative Order, will afford significant protections to our existing streams, lakes and rivers and their associated beneficial uses.

Response:

The SDRWQCB applauds the County for adopting the MSHCP and for pursuing a SAMP to protect habitat and special areas. However these plans are not focused on water quality and do not serve the purpose of the tentative Order, which is to reduce pollutants in urban runoff to the MEP. In order to fully protect these special habitats and aquatic areas, the County must ensure that the quality of water flowing into them is adequate to protect beneficial uses and quality of the habitats. Therefore, the tentative Order will serve as a supplement to the protection of these areas.

Section F.1 of the tentative Order requires the Permittees to assess their General Plans to ensure that they include water quality and watershed protection principles and policies. If these policies are already a part of your General Plan, then one could assume that the Permittees are already implementing many of the requirements in Section F of the tentative Order.

41. Comment (District, March 10, 2004):

At the February 11, 2004 hearing, the Board provided support for the following issues:

- The permit and monitoring program should be specific to the watershed.
- The requirements for RGOs should be carefully considered.
- Residential BMPs equal education.
- Duplicative inspection requirements should be deleted.
- The Order should be modified to allow recently adopted ordinances required for the Santa Ana permit to stand.
- Staff should work with Permittees to address the aforementioned issues.

Response:

Responses to each bulleted issue are below in the order they are presented in the comment.

- Various changes were made to the Orange County “template” in order to tailor the requirements to the Santa Margarita watershed (see Supporting Document No. 9 in the February 11, 2004 Agenda Package, *Significant Differences Between Order No. R9-2002-0001 (Southern Orange County) and Tentative Order No. R9-2004-001*). Additional changes are not necessary because the tentative Order provides flexibility for each Permittee to develop their own management programs, prioritize their own facilities, and determine appropriate BMPs. The monitoring program was specifically designed for the Upper Santa Margarita watershed.
- The RGO requirement has been considered and is discussed in response to Comment No. 85.
- The tentative Order gives the Permittees flexibility to determine adequate minimum BMPs. Ideally, an effective residential education program would result in greater public awareness, behavioral change and the self-motivated implementation of pollution prevention practices and other BMPs where necessary. If not, Permittees must require and enforce the use of BMPs to avoid illicit discharges and the contribution of pollutants to the MS4. The BMPs and strategy for implementation is to be determined by each Permittee. The tentative Order does not preclude a Permittee from using education as a primary approach. The text in Section H.3 of the tentative Order has been modified to provide the Permittees with additional flexibility in specifying high priority residential activities.
- According to the EPA, the federal storm water regulations envision a cooperative effort on the part of the NPDES permitting authority and permitted MS4s in the implementation of the industrial storm water program.²⁵ Dual regulation is discussed Section VII.E of the Fact Sheet. To avoid the unnecessary use of resources, Section H.2.d.5 states that, “To the extent that the SDRWQCB has conducted an inspection of an industrial facility during a particular year, the requirement for the responsible Permittee to inspect the site during the same year will be satisfied.”

²⁵ 1) EPA. November 1992. Guidance Manual for the preparation of Part 2 of the NPDES Permit Application for Discharges from Municipal Separate Storm Sewer Systems. Page 6-16. 2) EPA. December 19, 2000. Letter to Dennis Dickerson, LARWQCB.

- The comment above that the Order should be modified to allow recently adopted ordinances required for the Santa Ana permit to stand is taken out of context. According to the Reporter's Transcript of Proceedings from the February 11, 2004 SDRWQCB Meeting, the comment about modifying the permit was specific to the County of Riverside's grading ordinance. To address this issue, the time schedule for revising the grading ordinance has been increased from 6 months to a year after permit adoption. The City of Murrieta had not yet begun to update their grading ordinance, therefore, should have no problem ensuring that it is adequate to comply with both permits. The City of Temecula lies wholly within the San Diego Region, so this should not be an issue. See response to Comment No. 96.
- Staff has carefully reviewed all testimony and carefully analyzed the issues to reach a reasonable conclusion based upon information submitted by the close of the public comment period. The Permittees and interested parties have had ample time and opportunity to provide comments. Having discussions with the Permittees subsequent to the close of the comment period would have distracted the SDRWQCB from its responsibilities to consider all comments and make appropriate changes to the tentative Order.

42. Comment (District, March 10, 2004):

Following the hearing on February 11, we proposed meeting with staff to assist in addressing these directives [listed in Comment No. 41 above] and resolving other remaining issues. However, staff declined on the advice of counsel. Based on our experience in the renewal of the MS4 permit with the Santa Ana Region, your Board and the Permittees are missing an important opportunity. The Santa Ana Regional Board staff, with full knowledge and support of counsel and their Board, met with the Permittees throughout the summer to develop an effective permit that could be mutually supported. It is our hope that we will have the opportunity to work with your staff in this manner toward the same objective. We request that your Board authorize staff to meet with the Permittees to review our comments and to develop a mutually supportable permit.

Response:

Beginning in March 2003, Regional Board staff met with the Permittees to discuss the upcoming permit renewal process and to help the Permittees understand the anticipated requirements. We met on a monthly, then weekly basis, until the issuance of the tentative Order. In October 2003 we provided the Permittees with a preliminary draft for review. We discussed each section of the draft and addressed questions and concerns. Several modifications were made to the "template" used in Orange County to improve the permit and its applicability to the Upper Santa Margarita Watershed. The SDRWQCB also held a public workshop on January 23, 2004 and an initial public hearing to receive verbal testimony on February 11, 2004. Written comments on the tentative Order were accepted until March 10, 2004. Staff has carefully reviewed all testimony and carefully analyzed the issues to reach a reasonable conclusion based upon information submitted by the close of the public comment period. Staff, however, will be available to meet with and assist the Permittees in the development of their SWMPs.

43. Comment (SWRCB):

Why were the Threat to Water Quality Prioritization and Reporting of Non-compliance Sites sections removed from the Orange County template?

Response:

The intent of the Threat to Water Quality Prioritization was to prioritize facilities and sites for inspection and oversight purposes. This concept was not removed, it was just moved into the inspection sections of each permit component. The differentiation between BMP implementation at high, medium and low facilities was removed because BMPs should be implemented where pollutant-generating activities are occurring, regardless of the prioritization of the site.

Reporting of Non-compliance was removed from each section because it is included in Attachment B, Standard Provisions 1.1. Including it in each section was repetitive.

**44. Comment - The Tentative Order Does Not Contain a Safe Harbor Provision
(Richards/Watson/Gershon, March 10, 2004, City of Temecula)**

The Regional Board appears to believe that the City -- or for that matter any of the Permittees -- is in a position to completely stop storm water runoff which is created by other third parties, simply because those third parties lie within the City's jurisdiction. The Regional Board's apparent belief, however, is incorrect, both factually and legally. As the Court noted recently in Carson Harbor Village, Ltd. v. Unocal Corp., 287 F.Supp.2d 1118 (C.D. Cal. 2003), cities have little, if any control, over anything that goes into its sewer systems and, are not legally responsible for the components of storm water. 287 F.Supp.2d at 1192.

The lack of a Safe Harbor Provision in the Tentative Order is a source of very real concern for the City and the Permittees. Neither the "Prohibition" provisions (Part A, p. 6), nor the Receiving Water Limitations provisions (Part C, p. 7) of the Tentative Order provide any assurance to the City and the other Permittees that, once they have implemented the storm water management programs set forth in the Tentative Order in a timely and complete manner, they will then be deemed to be in compliance with the Tentative Order's Prohibitions and Receiving Water Limitations provisions.

The Regional Board has taken an action which finds no support in the Clean Water Act ("CWA"). The plain language of Section 402(k) of the CWA provides that "[compliance with a permit issued pursuant to this section shall be deemed compliance . . ." 33 U.S.C. § 1342(k). As the United States Supreme Court has noted: "[with few exceptions, for enforcement purposes a discharger in compliance with the terms and conditions of an NPDES permit is deemed to be in compliance with those section of the Clean Water Act on which the permit conditions are based." EPA v. State Water Resources Control Bd. (1976) 426 U.S. 200, 205.

Moreover, the State Water Resources Control Board specifically approved the inclusion of Safe Harbor provisions in Environmental Health Coalition, WQO No. 98-01 (1998). In that matter, the petitioner contended that the receiving water limitations section in the NPDES Permit for certain Orange County cities violated the CWA and its implementing regulations because it did not require compliance with water quality standards. That permit, like the Tentative Order,

provided "...that the permittees 'will not be in violation of [receiving water limitations] so long as they are in compliance with the requirements' for evaluating the DAMP."

The State Board specifically rejected the petitioners' contention that the inclusion of a Safe Harbor Provision was improper and went on to note that it had previously approved the same "Safe Harbor" provision in SWRCB WQO No. 96-13, with respect to the storm water permit for certain permittees in the Santa Clara Valley issued by the San Francisco Bay Regional Board. As the State Board stated:

"The SWRCB has already determined that the use of BMPs to achieve both the technology-based effluent limitations and the water quality-based effluent limitations complies with the CWA and the Porter-Cologne Act. See SWRCB WQO No. 91-03. Accordingly, the SWRCB agrees that use of the phrase that the "permittees will not be in violation of . . ." complies with the CWA and, in fact, used that same phrase in SWRCB Water Quality Order 97-03-DWQ (Waste Discharge Requirements for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities, NPDES General Permit No. CAS000001) (the General Industrial Permit)." WQO 98-01.

Furthermore, as the State Board noted in the Matter of the Petition of Save San Francisco Bay Association, et al., WQO No. 96-13, it has approved the inclusion of a Safe Harbor provision in the Receiving Water Limitations language for various storm water permits.

Accordingly, the City requests that the Regional Board include a Safe Harbor Provision in the Permit which it ultimately will adopt.

Response:

The commenter has failed to raise any new substantive issues to support changes to the tentative Order. The tentative Order requires the Permittees to reduce pollutants in urban runoff to the MEP, not completely stop all storm water runoff. The fact that the tentative Order does not contain a "safe harbor" provision is in accordance with recent SWRCB and USEPA guidance not referenced by the commenter.²⁶ The commentator cites **Carson Harbor Village Ltd v. Unocal Corp.**, 287 F.Supp.2d 1118 (C.D. Cal 2003) in an attempt to demonstrate that the Permittees are not responsible for components of storm water. The commentator fails to mention that the case concerned contaminated sediments and not compliance with receiving water limitations through iterative BMP implementation as required by the Phase I storm water program. The SDRWQCB has previously addressed this as part of the record and a detailed response to this issue can be found in the SDRWQCB response to the appeal of the Orange County MS4 Permit.²⁷

45. Comment - Receiving Water Limitation Language (EPA):

Commenters have argued that there is no basis for permit's requirements for water quality-based effluent limitations (WQBELs). In support of this contention, they cite a September 15, 1999 decision by the Ninth Circuit (Defenders of Wildlife v. Browner 191 F.3d 1159, 1166-67), in which the Court held that WQBELs are not necessarily required by the CWA for MS4 permits. However, as the Board is likely aware, the Court decision also provided that the permitting authority may include WQBELs in MS4 permits at its discretion based on Section 402(p)(3)(B)(iii) of the CWA. In a memo dated October 14, 1999 (after the Court's decision),

²⁶ SWRCB Orders No. 99-05 and WQ 2001-15 address receiving water limitations and the iterative approach

²⁷ Response In Opposition to Mission Viejo's Petition for Review of SDRWQCB Order No. R9-2002-0001 - NPDES Permit No. CAS0108740, SWRCB/OCC FILE A-1465 (C), July 26, 2002

staff of the State Board's Office of Chief Counsel recommended a continuation of permit language which had been developed prior to the Court decision. We believe this is fully consistent with the discretion provided by the Court, and that the permit is also consistent with the Court decision and the CWA.

Response:

Comment noted.

46. Comment - The Tentative Order Imposes Unfunded Mandates On the City and the Other Permittees (Richards/Watson/Gershon, March 10, 2004, District, January 28, 2004):

The City is concerned that the Tentative Order imposes an unfunded mandate on the City and all of the Permittees, in violation of the California Constitution. California Constitution, Article XIII B, § 6, provides that:

“Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service[.] “
Section 6 contains very limited exceptions to this otherwise very broad rule. A subvention of funds is not required for:

- (a) Legislative mandates requested by the local agency affected;
- (b) Legislation defining a new crime or changing an existing definition of a crime; or
- (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

The purpose of Section 6 is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations” which are imposed on the state by articles XIII A and XIII B. County of Fresno, 53 Cal.3d at 487; See also, County of Los Angeles, 43 Cal. 3d at 61. With certain exceptions, Section 6 essentially requires the state “to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies.” Hayes v. Commission on State Mandates (1992) 11 Cal. App.4th 1564, 1577. The State is most certainly required to reimburse local governments when it “freely chooses to impose on local agencies any peculiarly 'governmental' cost which they were not previously required to absorb.” City of Sacramento v. State of California (1990) 50 Cal.3d 51, 70. Section 6, Article XIII B, however, does not establish any specific procedure by which a local government may seek a subvention of funds from the State. Instead, the procedures to be followed when a local governmental agency seeks reimbursement from the state are set forth in Government Code §§ 17500-17630 (the “Unfunded Mandates Statute”). However, even though the Unfunded Mandates Statute establishes the procedure by which a local governmental entity may seek a subvention of funds, the Unfunded Mandates Statute fails to provide meaningful definitions for certain key terms.

An example is the term “mandates”. While the Unfunded Mandates Statute does contain a definition of the phrase “costs mandated by the State,” this State's Court of Appeal and Supreme Court have been called upon numerous times to analyze just what qualifies as a “mandate”, and

thus a cost that would potentially be entitled to a subvention of funds. For instance, in *Long Beach Unified School District v. State of California* (1990) 225 Cal. App. 3d 155, the Court of Appeals observed that: “we understand the use of ‘mandates’ in the ordinary sense of ‘orders’ or ‘commands,’ concepts broad enough to include executive orders as well as statutes.” 225 Cal. App. 3d at 174. In further discussing just how broadly this definition of “mandate” should be applied, the Long Beach court went on to note that “the concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public.” Id. at 174. The Court concluded that California voters, in approving the measure that is now enshrined as Article XIII B, Section 6, had intended that all state mandates, other than the ones excepted in Section 6, were to be reimbursed by the State. Id. at 175.

While the Unfunded Mandates Statute provides a definition for the term “mandate” it contains no such definition for the phrase “higher level of service”. As the Supreme Court observed in *County of Los Angeles v. State of California* while discussing the history behind the adoption of Article XIII B, neither this constitutional provision, nor the ballot materials that were issued prior to the provision's adoption, define this phrase. 43 Cal. 3d at 50. Courts, however, have provided guidance as to how this phrase should be interpreted. At least one court has said that phrase “higher level of service” is to be “read in conjunction with the phrase ‘new program.’” *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal. App. 4th 1176, 1191-1192. As the County of Los Angeles court noted, “[t]hus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing ‘programs.’” 110 Cal. App. 4th at 1191-92. The term “program” is also not defined in either Section 6 or the Unfunded Mandates Statute. Courts have concluded that in adopting Article XIII B, the voters of this State intended for this term to apply to “‘programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, imposed unique requirements on local governments and do not apply generally to all residents and entities in the state.’” 110 Cal. App. 4th at 1192 (internal citations omitted). As the County of Los Angeles Court noted, a program is only considered “new” when a local governmental has not “‘previously been required to institute it.’” Id. at 1189. Ultimately, though, the critical inquiry regarding this question is whether the State is “attempting to divest itself of its responsibility to provide fiscal support for a program, or forcing a new program on a locality for which it is ill-equipped to allocate funding.” *County of Los Angeles v. Commission on State Mandates*, 110 Cal. App. 4th at 1187.

Because the Permit now requires Permittees to inspect certain classes of facilities which were previously inspected by the Regional Board, the Permit arguably runs afoul of the central reason why Article XIII B, § 6 was adopted: “to preclude the state from shifting responsibility for carrying out governmental functions onto local entities that [a]re ill equipped to handle the task.” *County of Fresno v. State of California* (1991) 53 Cal. 3d 482, 487. This is a concern which the Permittees have repeatedly raised with the Regional Board and which Permittees also raised in their Report of Waste Discharge (“ROWD”). ROWD, at p. 7-1. Similarly, the City has also attempted to impress upon the Regional Board the very real fiscal difficulties which it will face if it is obliged to implement the enforcement provisions of the Tentative Order. See, *City of*

Temecula, Initial Comments, Tentative Order No. R9-2004-001, NPDES No. CAS0108766, at p. 3.

Therefore, Article XIII B, § 6 of the California Constitution (“Constitution”) would appear to dictate that the Permittees are entitled to a subvention of funds for the costs of complying with the Permit or stated a difference way, neither the Legislature nor the State or Regional Boards can require that the Permittees implement these new programs if they are not prepared to reimburse the Permittees for the costs of implementation.

Response:

The commenter has not provided any new substantive issues, and no changes are recommended to the tentative Order. The requirements of the tentative Order are not within the definition of “unfunded mandate” that would require reimbursement of costs under the California Constitution. This is because the requirements of the tentative Order are derived from the federal Clean Water Act, as opposed to State Law. Since the tentative Order would implement a federal requirement, rather than a state requirement, the Order is not an “unfunded mandate” by the state. The SWRCB has previously determined that constitutional provisions regarding state mandates do not apply to federally mandated NPDES permit requirements like the tentative Order.²⁸

47. Comment - Unfunded Mandates - (EPA):

Commenters have alleged that some of the permit requirements (e.g. inspection requirements for industrial/commercial facilities) exceed Federal requirements and thus become unfunded mandates prohibited by the California Constitution. We disagree that the permit requirements are not Federal requirements. As noted previously, we believe that the permit requirements are the Board’s best judgment regarding what the Board is required to do in order to comply with the CWA and Federal NPDES storm water regulations at 40 CFR 122.26. As such, the permit requirements are not unfunded mandates.

Response:

The SDRWQCB agrees with this comment from EPA.

48. Comment - Water Code Section 13389 Does Not Exempt the Regional Board From Compliance With CEQA (Richards/Watson/Gerhson, March 10, 2004 & District, January 28, 2004):

Given the programmatic and comprehensive scope of the Tentative Order, the Regional Board is obliged to comply with CEQA. This is because, as drafted, the Tentative Order significantly exceeds the scope of what is required to comply with the provisions of Section 402(p) of the Clean Water Act

One of the ways in which the Tentative Order exceeds the requirements of the CWA, thereby triggering the requirement that the Regional Board comply with CEQA, is the Order’s imposition of BMP’s for new development and significant redevelopment activities.

²⁸ SWRCB Order No. 90-3 and WQ 2000-11 (Page 15)

Given the programmatic, comprehensive and mandatory requirements for the inclusion of BMPs, not only this Tentative Order, but in the other storm water permits that the Regional board has adopted, it cannot avoid implementing the CEQA review process. For the Regional Board to impose such requirements, without first seeking CEQA review, effectively thwarts the purpose of CEQA which prohibits the "piecemealing" of projects, in order to avoid CEQA review. See *Bozung v. LAFCO* (1975) 13 Cal. 3d 263, 283; See also, CEB, Practice Under the California Environmental Quality Act, § 4.19. The Regional Board cannot, therefore, include specific provisions in all NPDES permits related to a particular category dischargers and hope to avoid CEQA review.

This Tentative Order is not merely a set of "waste discharge requirements," as that term is defined by Section 13263 of the Water Code, but amounts, instead, to a master land use planning document for those portions of Riverside County that lie within the Regional Board's jurisdiction. As such, it is similar to the general plans adopted by this State's cities to guide and plan their future growth and which are required to be adopted in accordance with the provisions of CEQA. CEB, Practice Under the California Environmental Quality Act, § 4.13. Chapter One of CEQA provides in part that: "each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." Cal. Pub. Res. Code § 21002.1. Accordingly, the Tentative Order must undergo CEQA analysis before the Regional Board can adopt formally adopt the Order.

Response:

The commenter has failed to raise any new substantive issues to support that the tentative Order is subject to CEQA. As stated in Finding No. 31 of the tentative Order, the issuance of waste discharge requirements and NPDES permits for the discharge of urban runoff from MS4s is exempt from CEQA requirements. The record, including SWRCB and Superior Court decisions²⁹, supports this finding. The SDRWQCB has previously addressed this as part of the record and a detailed response to this issue can be found in the SDRWQCB response to the appeal of the Orange County MS4 Permit.³⁰ The EPA also supports the SDRWQCB on this matter in Comment No. 49 below.

49. Comment - Tentative Order Subject to CEQA (EPA):

Commenters have argued that the proposed permit should be subject to CEQA because it allegedly includes requirements which exceed the requirements of the CWA, such as the SUSMP requirements. This issue was analyzed by the State Board in a number of recent orders, for example Order WQ 2001-15, dated November 15, 2001 which involved the San Diego MS4 permit. The State Board noted that the Regional Board is exempt from CEQA when issuing any NPDES permit, except for a permit for a "new source" as defined by the CWA; the MS4 would not be a new source as defined by the CWA - see Section 306(a)(2) of CWA.

²⁹ SWRCB Order WQ 2001-15, Page 13 and State Superior Court Case GIC780263, *Building Industry Association of San Diego County, et al., v. State Water Resources Control Board, et al.*, Continued Minute Order, Page 3, dated February 13, 2003.

³⁰ Response In Opposition to Mission Viejo's Petition for Review of SDRWQCB Order No. R9-2002-0001 - NPDES Permit No. CAS0108740, SWRCB/OCC FILE A-1465 (C), July 26, 2002

Given the State Board's analysis noted above, it does not appear to be relevant to the CEQA question whether a permit goes beyond the requirements of the CWA. Nevertheless, we believe that the best management practice (BMP) and other requirements in the permit are simply the Board's best judgment regarding what the Board is required to include in the permit to fulfill the Board's responsibilities under the CWA. As such, the permit requirements do not exceed the requirements of the CWA.

Response:

The SDRWQCB agrees with this comment from the EPA.

**50. Comment - The Tentative Order Interferes With the City's CEQA Processes -
(Richards/Watson/Gershon, March 10, 2004):**

The Regional Board has established requirements in the Tentative Order which substantially impede the City's control over land use within its jurisdiction. Furthermore, the Regional Board has not complied with CEQA's procedural and substantive requirements. The Regional Board seems to assume that the City has the authority to dictate the terms and conditions under which a third party may develop land within the City's boundaries. While this is true to a limited extent, there are some very real limits to the City's ability to impose conditions on third parties regarding the development of their private property. The Tentative Order, however, makes no recognition of this fact whatsoever.

The Tentative Order contains a number of provisions that specifically require the Permittees to adopt or modify their development approval project process (See, Permit § F.2). ordinances and policies for the review and approval of development and redevelopment projects in areas where discretion has been typically been reserved to the Cities. The City is concerned that, by establishing such requirements in the new NPDES Permit, the Regional Board has crossed the line into an area typically handled through building codes which are supposed to be uniform throughout the state.

Development controls typically only apply to "Discretionary Projects", as those projects are defined in Section 15357 of the Guidelines for Implementation of the California Environmental Quality Act ("Guidelines"). The Guidelines apply to those projects which require the exercise of judgment or deliberation by a city in connection with the decision to approve or disapprove the project, as distinguished from situations where the city merely must determine whether there has been conformity with applicable statutes, ordinances, or regulations. We question whether the City is capable of imposing the storm water control requirements on non-discretionary projects, such as the issuance of a building permit on a project where entitlements have already been granted and where the issuance of the permit is simply a ministerial act by a city.

The NPDES Permit also requires the City to revise its environmental review process (See, Tentative Order, § F.3) in its General Plan, including the land use element. We believe that these requirements are contrary and duplicative to State laws that adequately cover both General Plans and environmental review and represent an unwarranted interference with a city's planning functions.

Response:

The tentative Order does not interfere with the Permittees CEQA or development approval processes. Most of the development requirements in the tentative Order are what the Permittees should be already implementing in their existing program. The Permittees are required to ensure that new development projects implement BMPs in the existing MS4 permit and DAMP.³¹ Like the previous permit, the tentative Order requires that development projects address water quality through the implementation of appropriate BMPs. The tentative Order does not impede the Permittees ability to carry out their land use planning authority and responsibility. This authority clearly resides with the Permittees. The tentative Order does not limit the type or location of any land use.

With respect to discretionary and non-discretionary projects, the SWRCB has provided guidance that limiting the requirements to discretionary project may not be effective.³² This issue was also was appealed in the San Diego MS4 permit and was dismissed.³³

The tentative Order does not interfere with the Permittees CEQA process & General Plan. In fact the opposite is true. The Permittees already committed to addressing urban runoff in their CEQA process and General Plans in their 1993 DAMP. The DAMP states that the Permittees will incorporate "enforceable mitigation measures" in the CEQA process and adopt storm water policies for inclusion in the General Plan.³⁴ The tentative Order requirements are broader than the DAMP and seek to ensure that the environmental review process and General Plan to address water quality effects from development. The content, specific requirements, and appropriate mitigation measures are up to the discretion of the Permittees. The specific legal authority for these requirements is on Page 32 of the Draft Fact Sheet/Technical Report.

51. Comment (Richards/Watson/Gershon, February 10, 2004):

Evidentiary objections of the City of Temecula to documents purporting to support Tentative Order No. R9-2004-01. [This comment objects to various documents referenced in the Fact Sheet, based on the contention that the documents are not relevant to the conditions of the Upper Santa Margarita Watershed. The entire text of the comment is not included in this document. See Richards/Watson/Gershon comment letter, dated February 10, 2004.]

**52. Comment - The Tentative Order is Not Supported By Relevant Evidence
(Richards/Watson/Gershon, March 10, 2004):**

The State Water Resources Control Board's regulations governing adjudicative proceedings, such as a Regional Board's adoption of Waste Discharge Requirements, provide that such proceedings will be conducted in accordance with the provisions and rules of evidence set forth in Government Code § 11513. (See, 23 C.C.R. § 648.5.1). These same regulations provide that "hearsay evidence is admissible subject to the provisions of Government Code § 11513." Id. Government Code § 11513(c) in relevant part provides that: "any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." Govt. Code § 11513(c)(emphasis added). Nevertheless, evidence

³¹ SDRWQCB Order 98-02, Provision F.22 & DAMP, Appendix A

³² SWRCB Order WQ 2000-11, Page 26

³³ SWRCB Order WQ 2001-15, Page 4

³⁴ DAMP Section 4-15 & 4-16

must still be “relevant and reliable.” *Aengst v. Bd. of Medical Quality Assurance* (1980) 110 Cal.App.3d 275.

As an initial matter, before any evidence can be admitted, the proponent must lay a foundation for its admission. See, *People v. Haslouer* (1978) 79 Cal.App.3d 818, 825. Establishing a foundation for the evidence which a proponent seeks to admit is a prerequisite for the admission of any evidence. *People v. Morales* (1926) 77 Cal.App. 483, 492.

Most of the documents listed in support of the Tentative Order have little, if any, relevance to the conditions of the Upper Santa Margarita Watershed, and are not relevant. In order for evidence to be relevant, the evidence must demonstrate “same or similar” conditions. *Hercules Powder Co. v. Automatic Sprinkler Corp. of America* (1957) 151 Cal.App.2d 387, 400. According to this standard, the relevancy of most, if not all, of the reports and other documents referenced in the Tentative Fact Sheet are, at best, questionable and cannot be appropriately relied upon by the Regional Board in its adoption of the Tentative Permit. Notably, only four of the documents and reports listed in the fact sheet deal with the unique hydrology and conditions of that portion of the Santa Margarita Watershed that is the subject of the Permit.

As discussed below, the City also objects to many of the listed documents because the Regional Board has failed to establish an evidentiary foundation for these documents. Absent the laying of such a foundation, there is no basis for placing these documents into the administrative record.

53. Comment (Verbal – Evan McGinley, Richards/Watson/Gershon):

Very few of the references cited in the Fact Sheet have any specific application to this region and watershed.

54. Comment - Even If the Reports and Other Documents Cited In the Tentative Fact Sheet Were Arguably Admissible in These Proceedings, the Regional Board Has Failed To Show How They Support The Terms and Conditions In the Tentative Order (Richards/Watson/Gershon, March 10, 2004):

The Tentative Order contains numerous Findings of Fact which are completely unsupported by any specific references in the Tentative Fact Sheet to the Upper Santa Margarita Watershed. A case in point is Finding of Fact Number 4, at page 2, which provides that: “Urban runoff contains waste, as defined in the California Water Code (CWC), and pollutants that adversely affect the quality of the waters of the State. The discharge of urban runoff from an MS4 is a ‘discharge of pollutants from a point source’ into waters of the United States as defined in the CWA.”

What is completely absent from this finding of fact, though, is any evidence that it is applicable to the Upper Santa Margarita River Watershed. Certainly the Tentative Fact Sheet contains no specific support or references to how urban runoff is adversely affecting the Upper Santa Margarita River. For example, the Tentative Fact Sheet provides that: Urban runoff contains waste, as defined in the California Water Code (CWC), and pollutants that adversely affect the quality of waters of the State. The discharge of urban runoff from an MS4 is a “discharge of pollutants from a point source” into waters of the United States as defined in the CWA (Finding No. 4). Section 13050(d) of the CWC defines “waste” as “sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste

placed within containers of whatever nature prior to, and for purposes of, disposal.” 40 CFR 122.2 defines “point source” as “any discernable, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.” 40 CFR 122.2 defines “discharge of a pollutant” as “Any addition of any pollutant or combination of pollutants to waters of the U.S. from any point source.” Also, the justification for control of pollution into Californian waters can be found at CWC section 13260(a)(1), and State Water Resource Control Board (SWRCB) Order WQ 2001-15 verifies that urban runoff contains waste (SWRCB, 2001). Worse still, however, is that the Tentative Order contains Findings of Fact for which there is no corresponding support cited in the Tentative Fact Sheet. Finding of Fact Number 23 provides: RGOs are significant sources of pollutants in urban runoff. RGOs are points of convergence for motor vehicles for automotive related services such as repair, refueling, tire inflation, and radiator fill-up and consequently produce significantly higher loadings of hydrocarbons and trace metals (including copper and zinc) than other urban areas. To meet MEP, source control and treatment control BMPs are needed at RGOs that meet the following criteria: (a) 5,000 square feet or more, or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day. These are appropriate thresholds since vehicular development size and volume of traffic are good indicators of potential impacts of urban runoff from RGOs on receiving waters.

While the City is only listing two examples of how the Tentative Order's Findings of Fact are made without regard to any support in the Tentative Fact Sheet now, there are numerous other instances from which the City could provide examples.

Response to Comment Nos. 51 - 54:

The references, findings, and other documentation the SDRWQCB is relying on to support the tentative Order are applicable and appropriate for the Upper Santa Margarita Watershed. It is not necessary for references to be derived only from the Santa Margarita Watershed in order to be relevant and appropriate to support the tentative Order. Although very few of the documents referenced in the tentative Fact Sheet pertain specifically to other states, these references are appropriate because situations are analogous.

The tentative Order has similar requirements to the San Diego County MS4 permit which the Superior Court found contained administrative findings that were supported by the evidence.³⁵ Regarding the examples in Comment No. 54, the wording in Finding No. 4 is consistent with both SWRCB decisions and federal requirements.³⁶ The SDRWQCB has reviewed information within the Santa Margarita Watershed including the Permittees' own monitoring data that demonstrates that their urban runoff contains wastes including metals, pesticides, and bacteria.³⁷ Support for RGOs as potential sources of pollutants can be found in the Draft Fact Sheet/Technical Report (Section VIII.F), SWRCB guidance³⁸, LARWQCB and SDRWQCB technical report, *Retail Gasoline Outlets: New Development Design Standards for Mitigation of*

³⁵ *BIA V. SWRCB*, Case No. GIC780263, February 13, 2003

³⁶ SWRCB Order No. WQ 2001-15, Page 12 & Draft Fact Sheet/Technical Report, Page 8

³⁷ Permittee 2001-2002 and 2002-2003 Annual Reports.

³⁸ SWRCB July, 2 2002 Workshop on RGOs & Dismissal of WSPA Appeals on RGOs

Storm Water Impacts, and the inclusion of RGOs in the Phase II General Permit for the Discharge of Storm Water from Small MS4s (WQ Order No. 2003-0005-DWQ). The Permittees have not documented that the RGOs within the Santa Margarita Watershed are not potential sources of pollutants, or that they are in some way different than RGOs elsewhere in the state.

In response to Comment No. 53, the majority of the documents referenced in the Fact Sheet have specific application to this region and the Santa Margarita Watershed. The 92 documents referenced in the draft Fact Sheet, dated December 15, 2003, are comprised of the following:

- 30 documents specific to the Santa Margarita Watershed;
- 20 EPA documents applicable nationwide;
- 10 SWRCB documents applicable statewide;
- 17 documents specific to southern California;
- 11 general urban runoff-related documents (i.e., Center for Watershed Protection); and
- 4 documents specific to situations on the east coast that are relevant to the Santa Margarita Watershed (highway runoff, construction inspections, BMP design, and urban runoff pollutants in drinking water).

Various additional references specific to the Santa Margarita Watershed, San Diego Region, and State have been added to the revised Fact Sheet.

Overall, the information and references contained in the Fact Sheet and administrative record are applicable and appropriate to support the requirements in the tentative Order, and the commenter has not provided any new substantive issues to support any changes to the tentative Order or Fact Sheet References.

55. Comment - The Tentative Order, If Adopted By the Regional Board, Would Be In Violation of The Administrative Procedures Act (Richards/Watson/Gershon, March 10, 2004):

The Administrative Procedures Act ("APA"), Gov't Code § 11500, et seq., prohibits the Regional Board from adopting a regulation of general applicability without complying with the APA. While the issuance of individual waste discharge requirements may not be subject to the provisions of the APA, the standards, objectives, and guidelines which dictate the content of those requirements have to be formally adopted in accordance with the APA. Government Code § 11352(b). The Tentative Permit, however, does not represent any type of individualized determination regarding the terms and conditions which will need to be instituted by the Regional Board, in order for it to achieve its stated goal of reducing stormwater runoff. Instead, as the Regional Board's staff acknowledged at the Regional Board's hearing on the Tentative Order on February 11, 2004, the staff has adopted a "Template" which the Board originally adopted to regulate storm water discharges in San Diego County, but which has subsequently been used by the Board as the basis for the South Orange County MS4 Permit, and now for this Tentative Order. Such a "one size fits all" approach, however administratively convenient for the Regional Board's staff, cannot and should not be employed where, as here, there is no evidence of anything approaching the storm water and urban runoff problems which led to the creation of the original Template. As a result of using this Template, the Regional Board is essentially engaging in informal rulemaking through its creation of what essentially amounts to

the creation of a rule of general application, which establishes a type of water quality control program for the area within its jurisdiction. This failure to subject such a program pursuant to the formal rulemaking procedures set forth in the APA cannot be squared with the opinions rendered by this State's courts. *State Water Resources Control Bd. v. Office of Administrative Law*, (1993), 12 Cal. App. 4th 697, 703 ("Bay Planning"). In *Bay Planning*, a regional board adopted amendments to a water quality control plan, and the State Water Resources Control Board approved the amendments. A nonprofit group sought a determination that the amendments could not be adopted without following the APA. *Id.* at 700. The Court of Appeals agreed with the nonprofit group, holding that the water quality control plan was a quasi-legislative act, as contemplated by Government Code § 11342. The court noted that "a regulation which is part of a water quality control program is a regulation under the APA." *Id.* at 703. The State Board in *Bay Planning* ratified the Regional Board amendments, and, as noted above, the court found that the adoption of the amendments did not comply with the APA.

Although California law does not require administrative agencies to comply with the APA when simply issuing permits, including the issuance of Waste Discharge Requirements ("WDR"), the Tentative Order goes far beyond the terms of a typical WDR. It is, in effect, a set of regulations, containing standards of general application which fall within the scope of the APA. (Gov. Code § 11342(g).) As such, the exemption under Gov't Code Section 13389 for Waste Discharge Requirements is inapplicable. Government Code section 11342(g) defines the term "regulation" broadly to include "every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret or make specific law enforced or administered by it" (Gov. Code § 11342(g).) California courts have found that "any regulation promulgated contrary to the provisions of Chapter 3.5 of the Administrative Procedures Act is invalid." See, e. g., *Goleta Valley Community Hospital v. Department of Health Services* (1983) 149 Cal.App.3d 1124, 1129. Clearly, the Regional Board has attempted to "regulate" by requiring that Permittees modify their CEQA guidelines and modify their entire CEQA process in considering the imposition of mitigation measures to address potential adverse impacts from development and redevelopment projects. They further seek to "regulate" by imposing additional regulatory requirements on Permittees in revising their General Plans. In short, the APA expressly prohibits public agencies from issuing, utilizing and enforcing any order, rule or standard of general application, unless the same has been adopted as a formal regulation. See *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 496.

Response:

Adoption of the tentative Order is clearly exempt from APA. This is supported by the SWRCB and has specifically stated that the APA exempts the adoption of permits like the tentative Order from these requirements.³⁹ Adoption of the tentative Order cannot be construed as adopting a "regulation" or "rule" and is clearly a permit specifically exempt by the APA.⁴⁰ The tentative Order having similar or consistent requirements within the San Diego Region does not trigger the APA. None of the applicable statutes or regulations precludes the SDRWQCB from incorporating findings or requirements in a manner that ensures consistency. The SDRWQCB has previously

³⁹ SWRCB Order No. WQ 2000-11, page 15 & SWRCB Order 95-4

⁴⁰ Government Code Section 11352

addressed this issue as part of the record and a detailed response to this issue can be found in the SDRWQCB response to the appeal of the Orange County MS4 Permit.⁴¹

56. Comment - Water Code Section 13263 Clearly And Explicitly Requires The Regional Board To Consider Economic Factors In Developing A Permit (Richards/Watson/Gershon, March 10, 2004; District, January 28, 2004; City of Temecula):

The Regional Board has an obligation to consider the likely economic impact of the waste discharge requirements which it proposes to adopt through the Tentative Order, and the consideration of such impacts is specifically contemplated by the Water Code. Water Code § 13263 (“Discharge requirements; ...”) in relevant part provides that, in adopting any Water Discharge requirements,” the Regional Board is to consider, among other factors, “the provisions of [Water Code] Section 13241.” Section 13241, (“Water quality objectives; ...”), in turn, establishes several factors, which the Regional Board is obliged to consider in adopting any Waste Discharge Requirements, including:

- (a) Past, present and probable future beneficial uses of water;
- (b) Environmental characteristics of the hydrographic unit under consideration; including the quality of water available thereto;
- (c) Water quality conditions that could be reasonably achieved through the coordinated control of all factors which affect water quality in the area;
- (d) Economic considerations; (Emphasis added)
- (e) The need for developing housing within the region;
- (f) The need to develop and use recycled water.

Yet, in spite of this clear statutory mandate to the Board that it must consider the economic impact of any Waste Discharge Requirements prior to their adoption, there is no evidence that the Regional Board did so prior to issuing the Tentative Order. Certainly, the Regional Board makes absolutely no mention of ever having considered such factors in either the Tentative Order's findings of fact. (See generally, Tentative Permit, pp.1-5.) Nor is there any indication that the Regional Board considered such factors in the Tentative Fact Sheet. (See generally, Tentative Fact Sheet, pp. 3-23.) Finally, there is no indication that the Respondents ever considered such costs and benefits in their “Water Quality Control Plan – San Diego Basin (“Basin Plan”). (See, generally, Basin Plan, Chap. 4, pp. 4:1-4:106.) Nor is there any reference in the Permit to the Regional Board’s having ever considered the costs and benefits of achieving the compliance with such water quality standards. (See, Permit, pp. 1-5.)

The Regional Board’s failure to consider the economic impacts of its proposed Tentative Order are even more striking, given the comments which the County and County Flood Control District provided to the Board at its February 11th hearing on the Tentative Order as well as the comments which the Permittees are jointly submitting today. These comments serve to bolster a contention which the Permittees have made to the Regional Board’s staff, namely that the Tentative Order imposes significant funding obligations on the Permittees, by requiring, among other things, the increased monitoring obligations, as well as the inspection of commercial,

⁴¹ Response In Opposition to Mission Viejo’s Petition for Review of SDRWQCB Order No. R9-2002-0001 - NPDES Permit No. CAS0108740, SWRCB/OCC FILE A-1465 (C), July 26, 2002:

industrial facilities and construction sites which are otherwise regulated by the State Board's general permits.

57. Comment (District, January 28, 2004):

The Permittees have fundamental concerns about the way in which the Tentative Order proposes to manage runoff from urban development as an element of the overall water quality management program. Chief among these concerns is the prescriptive nature of the Tentative Order, which mandates implementation of a number of programs, none of which will address an identified water quality problem or promise to provide a significant water quality benefit. Further, these programs are mandated without consideration of the funding and staffing resources that will be required to implement these programs.

The cornerstone of the National Pollutant Discharge Elimination System is the concept that the discharge of pollutants from municipal storm sewers must be controlled "to the maximum extent practicable". The MEP standard is set forth in Section 402(p) of the Clean Water Act, which requires that NPDES permits shall: require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 U.S.C. § 1342(p)).(Emphasis added.) Almost by definition, the MEP standard requires a weighing of the costs and the benefits of any program to enhance water quality. (See, e.g., 64 Fed.Reg. 68722, 68754 (Dec. 8, 1999); Clean Water Initiative, p. 119; Board Order WQ 200011, p. 10.)

In addition, State law requires that the Regional Board consider the costs and the benefits associated with the development of Basin Plans. Pursuant to Water Code Section 13263(a), the Regional Board must consider all of the factors set forth in Water Code Section 13241 when issuing an MS4 permit. Water Code Section 13241 only authorizes the Regional Board to require water quality conditions "that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area". As part of its analysis, the Regional Board must take into account "economic considerations". (Water Code § 13241(d). Therefore, responsible public process calls for consideration of cost/benefits (supported by analysis and quantified costs) for permit requirements which implement Basin Plans. This is particularly critical in the Tentative Order for the Santa Margarita Region where numerous new requirements are proposed that potentially pose significant expense to municipal budgets with no identified funding sources. 64 Fed Reg 68722 & 68723 require flexible interpretation of the MEP concept based on sitespecific characteristics and "cost considerations as well as water quality effects ...". Thus, the Regional Board is also advised in the Federal Regulations to consider costs as a factor in determining the reasonableness and practicality of permit requirements.

Therefore, under both Federal and State law the Regional Board must consider the costs and the benefits of the Tentative Order. More fundamentally, the public demands consideration of economic factors in the establishment of all public policy, including public health and safety, education, homeland security and even defense. There is nothing to justify not considering economic factors in establishing requirements for public management of stormwater quality, especially in light of the current and expanding State and local fiscal crises. However, nothing in the Tentative Order or related documents indicates that such an analysis has taken place. The

Permittees are very concerned about the costs associated with implementing the program set forth in the Tentative Order. We would like to see a weighing of these costs with the benefits to be derived from some of the components of the program, especially those components such as the construction and industrial inspections that are currently being conducted by other entities, including the Regional Board.

While the Permittees share the Regional Board's goal of water quality protection, the Board of Supervisors and the City Councils have been elected by the citizens of California within the Santa Margarita Region to prioritize and balance finite public resources to provide many important public facilities and services. In addition to management of runoff quality from urban development, the Cities and County are responsible for providing police and fire services, libraries, infrastructure maintenance, parks, roads, drainage facilities, affordable housing, habitat conservation, environmental quality protection and many other municipal facilities and services. Although each of these needs are important, the realities of municipal finance do not permit any need to be funded without consideration of competing needs and priorities. The prescriptive requirements proposed in the Tentative Order preclude the local elected officials the opportunity to balance water resource needs with other resource needs. Further, our elected officials and the citizens of California within the Santa Margarita Region rightfully demand that expenditures be justified in terms of demonstrated local need and effectiveness of the proposed programs in addressing the local need. Therefore, even if a cost/benefit analysis were not required, prudent public policy demands that such an analysis be conducted.

A meaningful cost/benefit analysis cannot be prepared by the Regional Board's engineers and scientists alone. Such an analysis of cost and implementation impacts will require the full participation of the Permittee financial, legal and program staff.

58. Comment (San Diego Bay Council):

The claims of excessive costs by the dischargers were not compelling. This region has added thousands of new homes and hundreds of new businesses. They expect to add thousands more. The requirement to identify a funding source for storm water programs has been in effect since 1990. If there is not sufficient funds, then the governmental entities have inadequately collected developers fees on the new development. Further, it is well established in federal law that lack of funding does not excuse compliance with the Clean Water Act. Storm water pollution prevention is a necessary part of development infrastructure as is earthquake building standards and many other development requirements. The tentative Order does a good job ensuring that actions are taken in advance or along with development when such actions are least expensive and most effective.

Response to Comment Nos. 56, 57, and 58:

The following responds to the previous costs comments. The SDRWQCB is not required to perform a cost/benefit analysis, but has considered economic factors in developing the tentative Order.⁴² While regional boards are required to consider economic factors in the development of basin plans (CWC Section 13241), regional boards are not specifically required to undertake Cost/Benefit Analysis. Neither do federal regulations compel reliance on any particular form of

⁴² SWRCB Order WQ 2000-11, Page 20

economic analysis in the implementation of requirements based on the MEP performance standard; the admonition quoted from 64 Fed. Reg. 68722 & 68732 calls for flexible interpretation of MEP based on site-specific characteristics and "cost considerations as well as water quality effects...." Thus, while the regional board is advised to consider costs as a factor in determining the reasonableness or practicability of requirements, there is no state or federal mandate for a more formal economic analysis involving the development of Cost/Benefit or Cost-Effectiveness relationships. This is further supported by Los Angeles County Superior Court No. BS060960 and BS060957, that found that LARWQCB need not consider the economic burden imposed on the discharger or weigh the cost of compliance against the environmental benefits.

CWC Section 13241 includes economic considerations as a factor to be considered. However, provisions of the Section 13241 only apply indirectly to the tentative Order. Section 13241 clearly applies to the development of water quality objectives. It includes a list of "factors to be considered by a regional board in establishing water quality objectives." Therefore, Section 13241 may only apply to the tentative Order's application of the water quality objectives designated in the Basin Plan. These water quality objectives are developed during the Basin Plan's planning process, not during adoption of permits meant to implement the Basin Plan. As such, the provisions of Section 13241 are met by the SDRWQCB during the process of adoption and re-issuance of the Basin Plan, as well as during the Triennial Review of water quality standards the SDRWQCB conducts pursuant to the CWA. Because the tentative Order implements the Basin Plan's water quality objectives, these efforts to meet the provisions of Section 13241 during the Basin Plan planning process also apply to the tentative Order. Therefore, the SDRWQCB has met the requirements of Section 13241 with respect to both the Basin Plan and the tentative Order.

While the provisions of Section 13241 do not directly apply to the adoption of the tentative Order, the SDRWQCB has an adequate process to include "economic considerations" into the development and adoption of the tentative Order. The SDRWQCB has considered costs during the development of the San Diego, Orange County, and Riverside permits from various sources. These include the EPA's Cost/Benefit analysis for Phase II NPDES storm water regulations that concluded that benefits are likely to exceed costs.⁴³ In addition, SWRCB Order WQ 2000-11 states that the Los Angeles Regional Water Quality Control Board (LARWQCB) evaluated the costs of Standard Urban Storm Water Mitigation Plans (SUSMPs) even though the LARWQCB was not required to perform a cost-benefit analysis. Order WQ 2000-11 also states that cost should be considered in determining MEP, but the LARWQCB did not have to demonstrate that the water quality benefits outweigh economic costs. The SDRWQCB developed a Staff Report regarding numerical sizing criteria for BMPs for Order No. R9-2001-01⁴⁴ that includes calculations for estimated costs for compliance with the tentative Order's SUSMP provisions. The SDRWQCB also considered costs reported directly by the Permittees themselves in their annual reports. Also available is a report, written by the LARWQCB, which concluded that its

⁴³ EPA. 1999. Economic Analysis of the Final Phase II Storm Water Rule.

⁴⁴ SDRWQCB. 2001. Staff Report for Standard Urban Storm Water Mitigation Plans for Numerical Sizing Criteria for Best Management Practices.

cost estimates for permit compliance validate EPA cost estimates and the conclusion that the benefits of the storm water program are likely to exceed costs.⁴⁵

Finally, the SDRWQCB has considered costs through direct testimony from the Permittees during the February 11, 2004 Board meeting on the potential fiscal impact of the tentative Order. Provided the Permittees have been implementing the existing requirements, most of the requirements in the tentative Order are similar should not require an increase in costs. Where the Permittees have provided specific cost information on expanded requirements (i.e., monitoring), the SDRWQCB has made modifications to the tentative Order to reduce costs while maintaining the goal of the requirements.

59. Comment - The Tentative Order Improperly Requires the City to Inspect Construction and Industrial/Commercial Facilities (Richards/Watson/Gershon, March 10, 2004):

While many powers and duties of the Regional Board may be delegated to the Executive Officer, the Water Code does not provide for delegation of these duties to Permittees. See, Water Code §13223(a). The Regional Board abused its discretion by requiring Permittees to inspect restaurants, construction and industrial/commercial Sites which already are covered by State-issued permits, as well as other facilities. Site inspection responsibilities for commercial and industrial facilities are already covered by state- or federally-issued permits, including NPDES General Permits. The responsibility for inspections under these permits belongs to the State Board and Regional Boards. Water Code §13163, §13267(c). The CWA does not require the Petitioners to control pollutants from any and all commercial or residential facilities. (See, 40 C.F.R. 122.26(d)(2)(i).) Under these regulations, “storm water associated with industrial activity” is interpreted as those discharges coming from Phase I Industrial facilities. These facilities are already permitted by the State Board and the responsibility for the inspection of these facilities lies with the Regional Board. (40 C.F.R. 122.26(b)(14).) The Industrial/Commercial Facilities Program in the Permit shifts the responsibility for the inspection of a portion of Phase I facilities that are covered under the State’s General Industrial Permit to the Permittees. This attempt to pass along a current obligation of the Regional Board, and especially one which the Regional Board actually receives a fee for, to Permittees who would not be compensated for these inspections, clearly exceeds any authority of the Regional Board currently existing under state or federal law. Similarly, Section H.2.b of the Permit requires the Petitioners and other permittees to create an inventory of industrial facilities, whether or not they are subject to the General NPDES Permit for Storm Water Discharges Associated With Industrial Activities (“GIP”). The Permit also requires Petitioners and the other permittees to take steps to enforce the GIP against dischargers regulated under that Permit. Section H.2.d.

These provisions attempt to shift enforcement responsibility to the cities from the Regional Board. The Clean Water Act regulations governing MS4 permits do not require municipalities to inspect GIP facilities. Instead, the regulations require municipalities to inspect only a limited category of facilities (referred to as “Federally-mandated Facilities” in the Permit). Furthermore, the State Board has expressly provided that the Regional Board shall be responsible for enforcing the GIP. See Water Quality Order No. 97-03-DWQ, and Finding Nos. 11 and E.22 of Order No.

⁴⁵ LARWQCB. 2003. Review and Analysis of Budget Data Submitted by the Permittees for Fiscal Years 2000-2003: Los Angeles County Municipal Storm Water Permit. Dan Radulescu, P.E. and Xavier Swamikannu, D.Env.

99-08-DWQ, which adopted the current General Construction Activities Storm Water Permit (“GCASP”). Both the GIP and the GCASP are NPDES permits, issued by the State Board under Section 402 of the Clean Water Act. Under the MOA the Regional Board is obligated to inspect industrial and other permittees.

The MOA specifically provides that, with respect to the State’s inspection obligations, “[t]he Regional Boards shall conduct compliance inspections to determine the status of compliance with permit requirements . . .” (MOA, § IV.B.1.a.) Thus, the plain language of the MOA, neither mandates nor contemplates any inspection role or obligations for the Permittees. State agencies delegated the responsibility for administering NPDES permits must meet the requirements contained in 40 CFR Part 123, including having a program capable of conducting inspections to determine compliance with permit conditions. 40 CFR § 123.26(b)(2). Any agency sharing NPDES administration obligations with a designated state agency must have “[s]tatewide jurisdiction over a class of activities or discharges.” 40 CFR § 123.1(g). The Petitioners do not have authority to administer NPDES permits, inspect facilities for compliance with such permits nor, as importantly, have “statewide jurisdiction” over any activities or dischargers. Federal regulations do not require cities to inspect industrial facilities in general, including the entire subset of facilities required to obtain a GIP or GCASP. 40 CFR § 122.26(d)(2)(iv)(C). The regulations clearly contemplate that GIASP and GCASP facilities are a category separate and different than the facilities specifically identified in Section 122.26(d)(2)(iv)(C). The Regional Board cannot unilaterally delegate to the Petitioners the responsibility to inspect GIP and GCASP facilities. That responsibility belongs to the Regional Board.

Response:

The tentative Order does not seek to shift the responsibility to enforce statewide general construction and industrial storm water permits to the Permittees. It requires the Permittees to enforce their own ordinances and plans. The Permittees have existing storm water ordinances that require BMPs at both construction and existing development (including industrial and commercial facilities).⁴⁶ The Permittees have committed to controlling site erosion and construction materials pollutants at construction sites since their 1993 DAMP.⁴⁷ The Permittees already have specific requirements to inspect construction sites⁴⁸ and industrial/commercial sites⁴⁹ under requirements of the current MS4 permit. Dual regulation of construction and industrial sites is appropriate and has been addressed on Page 22 of the Draft Fact Sheet/Technical Report. Inspection of construction, industrial, and commercial sites is addressed on Pages 44 and 52 of Draft Fact Sheet/Technical Report.

In Comment No. 60, the EPA supports the requirement tentative Order’s requirement for inspections of industrial/commercial facilities.

60. Comment - Industrial/Commercial Inspections (EPA):

A commenter argued that EPA regulations do not require inspections of specific commercial facilities or some of the industrial facilities listed in the permit. First, with regards to commercial

⁴⁶ Riverside County Ordinance No. 754.1, Article II, Section 1

⁴⁷ DAMP, Section 4.0

⁴⁸ SDRWQCB Order 98-02, Finding 11 & Provision 21, DAMP

⁴⁹ USEPA Permit CAS0108766, Appendix 1-E

facilities, EPA regulations at 40 CFR 122.26(d)(2)(iv)(A) provide for a broad program of "source control and structural measures to reduce pollutants from runoff from commercial and residential areas . . ." We believe that this regulation provides a firm basis for the permit's requirements related to commercial facilities. The requirements for outreach to commercial facilities, the inspections, and the follow-up enforcement would all be consistent with a program of "source control" measures to be included in a storm water management program.

For industrial inspections, EPA regulations at 40 CFR 122.26(d)(2)(iv)(C) require that permittees develop and implement controls for certain specified industrial sources and other industrial facilities which "the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system." A commenter appears to be arguing that the list of industrial facilities for which the permit requires inspection goes beyond the list in the EPA regulations.

The issue of industrial inspections also arose for the Los Angeles County MS4 permit. The State Board, in a memo dated November 9, 2001, from Michael Lauffer of the State Board to Dennis Dickerson, Executive Officer of the Los Angeles Regional Board, noted that under Section 402(p)(3)(B)(iii) of the CWA, the Board has broad authority to require "such other provisions . . . as the State determines appropriate . . .", and that this would provide a basis for requirements that go beyond the specific provisions of the EPA regulations. We would agree with the State Board on this matter, and that the Regional Board would have the authority to require inspections of all the industrial facilities listed in the permit, despite the specific provisions of the EPA regulation.

Response:

The SDRWQCB agrees with this comment from the EPA.

61. Comment - The Regional Board Has Violated Health and Safety Code Section 57004 (Richards/Watson/Gershon, March 10, 2004):

In addition to having failed to comply with the APA, the Regional Board also failed to obtain peer review of their scientific findings in accordance with Health & Safety Code § 57004.

Health and Safety Code § 57004(b) requires the state and regional boards to "conduct a scientific peer review of the scientific basis for any rule proposed for adoption by any board, department or office within the Agency (i.e., the California Environmental Protection Agency). For purposes of § 57004, a "rule" is defined as either a regulation adopted pursuant to the APA or a "policy adopted by the State Water Resources Control Board, pursuant to the Porter-Cologne Water Quality Control Act . . ." Health & Safety Code § 57004(a)(1)(A) and (B).

Accordingly, because the Regional Board's adoption and implementation of a "Template" Permit is, for all intents and purposes, a rule of general application, which should, pursuant to the APA, undergo formal rulemaking, the Regional Board is also obliged to submit the Tentative Order to the requisite peer review, pursuant to Health & Safety Code § 57004.

62. Comment - The Federal Paperwork Reduction Act Is Applicable to The Requirements Under The Permit (Richards/Watson/Gershon, March 10, 2004):

The Regional Board's Tentative Order demonstrates a failure by the Board to comply with the Paperwork Reduction Act ("PRA") to the Permit, 44 U.S.C. § 3051. Section 1 of the PRA provides, in relevant part, that the purpose of the PRA is to: "...minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government;..." 44 U.S.C. § 3501(1)(emphasis added).

Clearly, then, the PRA covers information both sought by or provided to the Federal Government. Under the terms of both the Permit, as well as the 1989 Memorandum of Agreement ("MOA") between USEPA and the State Board which governs the state's administration of the NPDES program, the City will be required to report a variety of information to the state and federal government, specifically, USEPA Region IX. Article IV, Section C.1 of the MOA explicitly provides that "[t]he Regional Boards shall require each NPDES permittee to send copies of its Discharge Monitoring Reports ("DMRs") to EPA and the Regional Boards for review. The City will also required to submit these monitoring reports, pursuant to the terms of 40 C.F.R. § 122.48 ("Requirements for recording and reporting of monitoring results (applicable to State programs, see § 123.25)").

63. Comment - The Federal Regulatory Flexibility Act Is Applicable To The Regional Board's Tentative Order (Richards/Watson/Gershon, March 10, 2004):

Under the federal Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 601 et seq., the government cannot simply impose information gathering requirements, without first mandating that such requirements comply with the provisions of the RFA. The RFA applies not only to the federal government, but to state governmental agencies as well, where, as here, the Regional Board is acting in place of the federal government.

Recently, the Ninth Circuit decided the question of whether the USEPA had properly certified that the Phase II General Stormwater NPDES Permit had been properly certified that compliance with the permit would impose a significant economic impact on future Permittees. *Env'tl Def. Center v. U.S. Env'tl Protection Agy.* (9th Cir. Sept. 15, 2003) No. 00-70014 and No. 00-70734, at 13843-13846. The Court decided that the USEPA had properly so certified. *Id.*, at 449. More importantly, for purposes of these comments, given the Respondents' obligations under the MOA to comply with federal law in their administration of the NPDES program and in light of the applicability of the RFA to other stormwater permits similar to the one at issue here, the Regional Board must undertake an analysis of the cost of regulatory compliance, as required by the RFA.

Response to Comment Nos. 61, 62, and 63:

The commenter has failed to raise any new substantive issues. The Federal Paperwork Reduction Act, California Government Code §11346.3, the Health and Safety Code §57004, Federal Regulatory Flexibility Act do not control the issuance of a permit to discharge waste (waste discharge requirements) under the NPDES program.

A central flaw in the comment is the commenter's failure to discriminate between the issuance of a permit for the discharge of wastes and the process of rulemaking - such as the adoption of a Water Quality Control Plan (Basin Plan). Although the commenter repeatedly refers to

“Permittees” and to the “Permit” elsewhere in the comment letter, the commenter has confused the adoption by the SDRWQCB of a NPDES Permit and Waste Discharge Requirements, which authorize the Permittees to discharge waste, with the promulgation or adoption of a regulation or rule in presenting these arguments. The Federal Paperwork Reduction Act, California Government Code §11346.3, and the Health And Safety Code §57004, and Federal Regulatory Flexibility Act are applicable to the adoption of regulations (rulemaking), but are not applicable to the issuance of Waste Discharge Requirements and NPDES Permits. Throughout the sections of these statutes and regulations quoted by the commenter, the applicable action is the adoption of a “regulation” or a “rule”.

64. Comment - Vested Tract Rights (District, January 28, 2004 & District, March 10, 2004):

The Tentative Order Is Subject To Restraints Imposed By The Legal Doctrines of Vested Rights And Estoppel In The Context Of Private Property Development.

The California Supreme Court in *Avco Community Developers, Inc. v. South Coast Regional Com.*, 17 Cal. 3d 785, 793, 132 Cal Rptr. 386 (1976) held that where a private property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction of the development in accordance with the terms of the permit. Once a landowner has secured a vested right, the government may not, by virtue of a change in the land use laws, prohibit construction authorized by the permit upon which he relied. A common scenario involving vested rights takes place where the conditions attached to a tentative map have been satisfied by a subdivider and then the local legislative body is required to approve a final subdivision map. For example, in a case involving the Subdivision Map Act (Government Code §§ 66410 et seq.), the California Supreme Court held that once all discretionary approvals are obtained then the project is subject to vesting despite the need to obtain ministerial approvals. See *Youngblood v. Board of Supervisors*, 22 Cal. 3d 644, 653-657, 150 Cal. Rptr. 242 (1978). Similar reasoning applied to a phased project involving a special use permit in *Toigo v. Town of Ross*, 70 Cal. App. 4th 309, 82 Cal. Rptr 2d 649 (1999). A vested right has been found on the part of a scrap recycler where he was allowed to continue a nonconforming use of improvements already constructed pursuant permits issued by the city, *Halaco Engineering Co. v. South Central Coast Regional Com.*, 42 Cal. 3d 52, 207 Cal. Rptr. 672 (1986).

Another area in which vested property rights arise is based on contract. Both the United States and California constitutions contain provisions that bar state and local governments from passing any law impairing the obligation of contracts. Such laws come within the classification of invalid retrospective legislation. See United States Constitution, Article I, § 10, Clause 1 and California Constitution, Article I, § 16. Examples of such contracts in the land use context include: annexation agreements, bonded indebtedness, development agreements, subdivision improvement agreements, mineral leases and landlord/tenant leases. See *Monterey Sand Co. v. Coastal Comm'n*, 191 Cal. App. 3d 169, 236 Cal. Rptr. 315 (1987); *Ross v. City of Berkeley*, 655 F. Supp. 820, 827 (N.D. Cal. 1987); *Morrison Homes Corp. v. City of Pleasanton*, 58 Cal. App. 3d 724, 130 Cal. Rptr. 196 (1976); *Trimont Land Co. v. Truckee Sanita . Dist.*, 145 Cal. App. 3d 330, 193 Cal. Rptr. 568 (1983).

In addition, certain contracts referenced above are subject to additional statutory requirements and protections. Cities and counties are authorized to enter into binding development agreements with property owners for the development of private property (Government Code §§ 65864-65869.5). Such agreements provide a specific form of vested right where the agreements can supersede any change in planning, zoning, subdivision or building regulations adopted after the execution of the particular agreements. See Government Code § 65865.4. Moreover, regulations governing permitted uses of the land, density design, improvement, and construction standards and specifications, applicable to development of the property subject to a development agreement, are the regulations in force at the time of execution of the agreement. See Government Code §§ 65866. Development agreements have been judicially interpreted under a liberal construction to uphold their legal validity, *Santa Margarita Area Residents Together v. San Luis Obispo County*, 84 Cal. App. 4th 221, 100 Cal. Rptr. 2d 740 (2000).

Another example of contracts with statutory protections are subdivision improvement agreements entered into pursuant to the Subdivision Map Act (Government Code § 66410 et seq.). Such agreements address road, drainage, sewer and water infrastructure improvements, including layout and design (Government Code § 66462, 66499-66499.10). The Subdivision Map Act provides additional sources of vested right where a final map has been approved or where a vesting tentative map is involved. See *City of West Hollywood v. Beverly Towers, Inc.*, 52 Cal. 3d 1184, 1192, 278 Cal. Rptr. 375 (1991); *Bright Dev. v. City of Tracy*, 20 Cal. App. 0 783, 24 Cal. Rptr. 2d 618 (1993); and Government Code § 66498.1.

In a related area of the law, estoppel, the California Supreme Court has stated that the vested rights doctrine is grounded upon the principle of equitable estoppel which may be applied against the government where justice and fairness require it. An equitable estoppel requiring the government to exempt a land use from a subsequently imposed regulation must include (1) a promise such as that implied by a building permit that the proposed use will not be prohibited by a class of restrictions that includes the regulation in question; and (2) reasonable reliance on the promise by the property owner to his detriment. _See *Santa Monica Pines, Ltd., v. Rent Control Board*, 35 Cal. 3d 858, 867, 201 Cal. Rptr. 593 (1984); *Stanson v. San Diego Coast Regional Com.*, 101 Cal. App. 3d 38, 39, 161 Cal. Rptr. 392 (1980); and *Wilson v. City of Laguna Beach*, 6 Cal. App. 4th 543, 7 Cal. Rptr. 2d 848 (1992).

The Regional Board and the Permittees must take heed of the legal considerations discussed above to the extent that a conflict arises with the terms of Tentative Order No. R9-2004-001. Said order, in its current form, seeks to impose an extensive scheme of requirements upon a variety of land use areas consisting of. new development, redevelopment, construction activities, municipal activities and facilities, industrial facilities, commercial facilities and residential neighborhood activities.

The Chairman indicated at the February 11, 2004 Hearing that vested tentative maps and development agreements did not trump state or federal law, or by implication NPDES permits derived therefrom, on the basis of the exception language cited in Government Code §§ 65869.5 and 66498.1.c. However, the Permittees would respectfully point out that where the permit may contain requirements not supported by state or federal law then such requirements will necessarily fail where they come into conflict with the statutory scheme for Vested Tentative Maps (Government Code §§ 65864-65869.5) and Development Agreements (Government Code

§§ 66498.1-66498.9). Moreover, in addition to the estoppel concerns raised earlier, constitutional prohibitions exist against state or federal governments from passing any law that impairs the obligations imposed by existing contracts. Such constitutional protections may presumably apply even to those contracts created by statute such as development agreements, subdivision improvement agreements, etc. See United States Constitution, Article I, § 10, Clause 1 and California Constitution, Article I, § 16. Provision G. 7. of the revised Tentative Order proposes text reflective of this limit of authority.

Response For Comments 64:

Chairman John Minan of the SDRWQCB responded to this issue during the February 11, 2004 board meeting.⁵⁰ Mr. Minan indicated that state and/or federal law trumps any provision that might be claimed for as a protected vested right under a development agreement. Since the requirements of the tentative Order are based on federal law, these requirements would apply to developments with vested rights.

Findings

65. Comment - Finding No. 7 (District, March 10, 2004):

This statement [Finding No.7] is irrelevant as the coast is 30 miles distant from the nearest point of the Permittee's MS4. Statement should be removed as follows:

"Pollutants in urban runoff can threaten human health. Also, urban runoff pollutants in receiving waters can bioaccumulate in the tissues of invertebrates and fish, which may be eventually consumed by humans."

Response:

The purpose of the statement is to support the general conclusion that pollutants in urban runoff can threaten human health, not that pollutants in urban runoff from the Upper Santa Margarita Watershed has impacted recreation in coastal waters. The statement is not the basis for any specific requirement in the Permit.

66. Comment - Finding No. 8 (District, March 10, 2004):

Development does occur that does not threaten ESAs. Statement [Finding No. 8] should be revised as follows:

"Development and urbanization may threaten environmentally sensitive areas (ESAs), such as water bodies designated as supporting a RARE beneficial use (supporting rare, threatened or endangered species) and CWA 303(d) impaired water bodies. Such areas have a much lower capacity to withstand pollutant shocks than might be acceptable in the general circumstance. In essence, development that is ordinarily insignificant in its impact on the environment may

⁵⁰ Comment from SDRWQCB Chairman John Minan, Item 12, Transcript Page 197-200.

become significant in an ESA. Therefore, additional control to reduce pollutants from new and existing development may be necessary for areas adjacent to or discharging directly to an ESA.”

Response:

The requested revision to Finding No. 8 has not been made. The wording “especially threaten” was used in this Finding to emphasize the protection of ESAs. The Finding further states that “additional control...may be necessary”, which implies that development may occur that does not threaten ESAs.

67. Comment - Finding No. 10 (District, March 10, 2004):

The potential impacts of urban development are variable depending on site-specific conditions. Statement [Finding No. 10] should be revised as follows:

“Peak stormwater discharges rates, velocities and durations may need to be controlled to prevent downstream erosion and protect stream habitat where receiving waters have not been stabilized. When natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops, and parking lots, the natural absorption and infiltration abilities of the land may be lost. Therefore, runoff leaving a developed urban area may be greater in volume, velocity, peak flow rate, and pollutant load than pre-development runoff from the same area. The increased volume, velocity, rate, and duration of runoff may accelerate the erosion of downstream natural channels.”

Response:

The requested modification to Finding No. 10 is not necessary and has not been made. It is well-documented in the record that urbanization increases the volume and velocity of runoff, which has the long-term effect of substantially increasing the width of natural streams through erosion and scouring, therefore, the Finding accurately supports Requirement F.2.b.9 of the tentative Order. Similarly, the Permittees’ DAMP⁵¹ supports this Finding when it states:

As the natural landscape is covered over with pavement or buildings, the amount of water-absorbing or pervious surface decreases. Water that previously soaked into the ground, removing pollutants by filtering through soil, and eventually replenishing groundwater supplies, now must flow overland and therefore enters local streams more rapidly. The rapid transport of the water increases the erosion of stream banks and hillsides and does not permit filtering of pollutants. Sediment carried by storm water runoff can build up in streambeds, harming fish and aquatic life. The sediment acts as a transport mechanism for pollutants which adhere to soil particles.

It is not clear what the Permittees mean by “stabilized” receiving waters.

68. Comment - Finding No. 10 (Verbal – John Harris, Richards/Watson/Gershon):

How has new development increased the volume and velocity of runoff into the Santa Margarita River and Temecula and Murrieta Creeks?

⁵¹ Permittees. March 1993. Santa Margarita Regional Drainage Area Management Plan. Page 2-2.

Response:

The requested modifications to Finding No. 10 have not been made because the effects of urbanization on volume, velocity, peak flow rate, and pollutant load is well-documented in the record.⁵² In addition to the information in the Fact Sheet, the quote from the DAMP contained in the response to Comment No. 67 explains how new development in the Upper Santa Margarita Watershed increases the volume and velocity of runoff.

Furthermore, the Permittees should have information confirming the effects of urban development within the Santa Margarita Watershed. It should be noted that the Riverside County Flood Control and Water Conservation District states that is required by law to ensure runoff from new development does not adversely impact downstream properties.⁵³

69. Comment - Finding No. 12 (District, March 10, 2004):

The MEP standard is an ever-evolving, flexible, and advancing concept, which considers technical and economic feasibility. As knowledge about controlling urban runoff continues to evolve, so does that which constitutes MEP. Reducing the discharge of stormwater pollutants to the MEP requires Permittees to conduct and document evaluation and assessment of each program component and revise activities, control measures, best management practices (BMPs), and measurable goals, as necessary to meet MEP. Because MEP is a dynamic performance standard, it is necessary to describe in greater detail, measures that are essential for compliance.

It is not clear why the assertion that MEP is a dynamic performance standard necessitates prescribing compliance measures in greater detail. By doing so, the Regional Board is removing the flexibility that MEP was intended to allow. Further, it precludes the opportunity envisioned in the federal regulations for the Permittees to evolve their urban runoff management program based on local conditions, need and results of existing program.

Response:

The fact that MEP is ever-evolving necessitates the SDRWQCB when renewing the MS4 Permits to clearly identify the criteria that the Permittees will be held to for achieving the MEP standard. This criteria includes measures and programs that were proposed, perhaps developed and even perhaps implemented by the Permittees during previous years. In addition, the criteria will include new or revised program elements that are necessary to either identify potential sources that contribute pollutants in MS4 discharges, implement measures or require measures to reduce the pollutants of the MEP and measures to assess the effectiveness of these program components. The permit components need to contain sufficient detail so that the Permittees have a clear understanding of what is expected of them by the SDRWQCB. However, the requirements still provide the Permittees sufficient flexibility to consider the various factors in selecting specific BMPs to achieve MEP.

70. Comment - Finding No. 16 (District, March 10, 2004):

⁵² Page 13, Draft Fact Sheet/Technical Report

⁵³ Page 21, Additional Comments Regarding Tentative Order No. R9-2004-001 NPDES CAS0108766, Attachment to District March 10, 2004 letter

Urban runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into a receiving water. Federal regulations at 40 CFR 131.10(a) state that in no case shall a state adopt waste transport or waste assimilation as a designated use for any waters of the U.S. Authorizing the construction of an urban runoff treatment facility within a water body, or using the water body itself as a treatment system or for conveyance to a treatment system, would be tantamount to accepting waste assimilation as an appropriate use for that water body. Furthermore, the construction, operation, and maintenance of a pollution control facility in a water body can negatively impact the physical, chemical, and biological integrity, as well as the beneficial uses, of the water body. This is consistent with EPA guidance to avoid locating structural controls in natural wetlands.

Please provide reference for EPA guidance identified in last paragraph.

Response:

The pertinent reference is: *EPA Guidance Manual for the Preparation of Part 2 of the NPDES Permit Application for Discharges from Municipal Separate Storm Sewer Systems*, EPA 833-B-92-002. November 1992. Page 6-21.

71. Comment – Finding No. 19 (District, March 10, 2004):

Permittees propose to add the underlined language to Finding No. 19:

In accordance with federal NPDES regulations and to ensure the most effective oversight of industrial and construction site discharges, discharges of runoff from industrial and construction sites are subject to dual (state and local) storm water regulation. Under this dual system, the SDRWQCB is responsible for enforcing the statewide General Construction Activities Storm Water Permit, SWRCB Order 97-03 DWQ, NPDES No. CAS000001 (General Construction Permit) and the General Industrial Activities Storm Water Permit, SWRCB Order 99-08 DWQ, NPDES No. CAS000002 (General Industrial Permit). Each municipal Permittee is responsible for implementing a program, including inspections, to implement and enforce an ordinance to prevent illicit discharges to the MS4 [§122.26 (d)(iv)(B)] and implementing a program to inspect construction sites to enforce control measures to reduce pollutants in storm water runoff from construction sites [§122.26(d)(iv)(D)], which include enforcing its local permits, plans, and ordinances, which may require the implementation of additional BMPs than required under the statewide general permits.

Response:

The purpose of Finding No. 19 is to support the requirements for BMP implementation, inspections, and enforcement at construction sites and industrial/commercial facilities contained in Sections G and H.2 of the tentative Order. Sections VII.E, VIII.G, and VIII.H.2 of the Fact Sheet contain discussions in support of this finding, including references to applicable federal regulations. Therefore, it is not necessary to include the proposed language in the finding.

72. Comment - Finding No. 23 (District, March 10, 2004):

RGOs are significant sources of pollutants in urban runoff. RGOs are points of convergence for motor vehicles for automotive related services such as repair, refueling, tire inflation, and radiator fill-up and consequently produce significantly higher loadings of hydrocarbons and trace metals (including copper and zinc) than other urban areas. To meet MEP, source control and treatment control BMPs are needed at RGOs that meet the following criteria: (a) 5,000 square

feet or more, or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day. These are appropriate thresholds since vehicular development size and volume of traffic are good indicators of potential impacts of urban runoff from RGOs on receiving waters.

Chairman stated that this should be considered for elimination from tentative Order at the February Hearing.

Response:

The inclusion of RGOs has been seriously considered. It has been sufficiently documented that RGOs are a significant source of pollutants and should be included as a Priority Development Category. The SDRWQCB followed the direction from the SWRCB WQ 2001-15 (Appeal of the San Diego MS4 Permit) in developing the tentative Order and included a specific finding (Finding 23) identifying RGOs as potential significant sources of pollutants, a discussion of RGOs in the Draft Fact Sheet⁵⁴, and a size threshold⁵⁵. In addition, the inclusion of RGOs has been further addressed by the SWRCB through the appeals of the MS4 permits for the Los Angeles and San Francisco Regional Boards that included RGOs as a priority development category. The SWRCB held a workshop⁵⁶ that identified RGOs as significant sources of pollutants and dismissed the petitions for removal of the RGOs in the permits.⁵⁷ The Western States Petroleum Association, who filed the appeals on RGOs, did not comment on the tentative Order. Finally, the SWRCB adopted a General Permit for the Discharge of Storm Water from Small MS4s (WQ Order No. 2003-0005-DWQ) includes RGOs as a priority development category.

73. Comment - Finding No. 25 (District, March 10, 2004):

Section 6217(g) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) requires coastal states with approved coastal zone management programs to address non-point pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point pollution: agriculture, silviculture, urban, marinas, and hydromodification. This NPDES permit addresses the management measures required for the urban category, with the exception of septic systems. The adoption and implementation of this NPDES permit relieves the Permittee from developing a non-point source plan, for the urban category, under CZARA. The SDRWQCB addresses septic systems through the administration of other programs. Murrieta and Temecula are not within the CZARA coastal zone, therefore Finding No. 25 is not applicable to the Permittees. Finding No. 25 should be removed.

Response:

Section 6217 of CZARA requires the 29 coastal states and territories, including California, to develop coastal nonpoint pollution control plans. In lieu of developing a separate program for the coastal zone, the SWRCB and the California Coastal Commission developed the Plan for California's Nonpoint Source Pollution Control Program to comply with CZARA and CWA section 319 requirements. This document applies statewide, therefore, this finding is applicable

⁵⁴ Page 35, Draft Fact Sheet Technical Report Dated December 15, 2003

⁵⁵ Requirement F.2.b).(1).(i) of tentative Order

⁵⁶ SWRCB Workshop, July 2, 2002

⁵⁷ Discussions with Dan Radulescu, LARWQCB, Region 4

and has not been removed. Regardless, the permitted area drains to the Pacific Ocean, and, as documented in Section VI.D. of the Fact Sheet, does affect the coast.

74. Comment - Finding No. 26 (District, March 10, 2004):

Each Permittee is individually responsible for adoption and enforcement of ordinances and/or policies, implementation of identified control measures/BMPs needed to prevent or reduce pollutants in storm water runoff, and for the allocation of funds for the capital, operation and maintenance, and enforcement expenditures necessary to implement and enforce such control measures/BMPs within its jurisdiction. There are many non-jurisdictional facilities and activities "within" the Permittee's jurisdictions. The Permittee's ordinances and/or policies only apply to those facilities and activities "under" their jurisdictions.

Response:

The word "within" has been changed to "under" in Finding No. 26.

75. Comment – Finding No. 29 (District, March 10, 2004):

Permittees propose to add the underlined language to Finding No. 29:

The issuance of waste discharge requirements and an NPDES permit for the discharge of urban runoff from MS4s to waters of the United States is exempt from the requirement for preparation of environmental documents to the extent that actions are required under the CWA under the California Environmental Quality Act (CEQA) (Public Resources Code, Division 13, Chapter 3, section 21000 et seq.) in accordance with the CWC section 13389.

Response:

This additional language is not necessary because all requirements contained in the tentative Order are consistent with the CWA and federal NPDES regulations and necessary to meet the MEP standard. In support of this, EPA's comment letter states that the tentative Order is fully consistent with the CWA, EPA regulations, and is appropriate for the Santa Margarita Watershed.⁵⁸

ADDITIONAL FINDINGS:

The following findings are based upon information discussed in the Fact Sheet and have been added to the tentative Order to identify the 303 (d) water quality impairment and its potential source; to identify the constituents that exceed water quality objectives based the monitoring data submitted by the Permittees; and to reference other documents as examples of studies that indicate potential impacts of urban runoff in the Santa Margarita Watershed.

Finding No. 10: *The Final CWA Section 303(d) List of Water Quality Limited Segments identifies the entire length of Murrieta Creek (12 miles) and the upper portion of the Santa Margarita River (18 miles) as impaired for phosphorus. Potential sources of the phosphorus impairment include urban runoff and unknown point and nonpoint sources. The Santa Margarita Lagoon is listed as impaired for eutrophication.*

⁵⁸ EPA Region IX. Comment letter on tentative NPDE Permit No. CAS0108766 for Riverside County and Co-Permittees. March 5, 2004.

Finding No. 11: *The Permittees' water quality monitoring data submitted to date documents persistent exceedances of Basin Plan water quality objectives for various urban runoff-related pollutants (chlorpyrifos, chromium, diazinon, dissolved oxygen, fecal coliform, MBAS, phosphorus, etc.) at eight different monitoring stations in the Upper Santa Margarita Watershed. The data indicate that urban runoff from activities such as over-application of pesticides and potential illicit discharges from industrial and commercial activities may be contributing to potential water quality impairments. Also, bioassessment monitoring, conducted by the California Department of Fish and Game, and physical assessments, conducted by the SDRWQCB, EPA, and L.C. Lee & Associates, of the Santa Margarita Watershed indicate that impacts to the biological and physical integrity of receiving waters have occurred as a result of urbanization in the upper watershed.*

Section B – Non-Storm Water Discharges

76. Comment – Section B.2 (MCWD):

Section B.2 of the tentative Order lists non-storm water discharges that are not prohibited. Water line flushing and discharges from potable water sources, which the MCWD has a permit for, are included on the list. It is my understanding that this paragraph means that permits for water line flushing and discharges from potable water sources are will no longer be required. This would be a great benefit to us and other agencies that have to renew, and pay for, permit for this type of discharge. If this is correct will there be a statement from the SDRWQCB to agencies relieving them of this requirement or does the MS4 assume that status. Please let me know if I am correct in my interpretation of Section B.2.

Response:

Requirement B.2.m has revised as follows:

“(m) Discharges from potable water sources not subject to NPDES Permit No. CAG679001 other than water main breaks;”

As documented in the record⁵⁹, the SDRWQCB responded to this comment in writing. The written response included the following:

“Requirement B.1 states that each MS4 permittee must effectively prohibit all types of non-storm water discharges into its MS4 unless such discharges are either authorized by a separate NPDES permit or authorized in accordance with Requirement B.2. The separate NPDES permit that authorizes the discharge of potable water is Order No. R9-2002-0020 (NPDES Permit No. CAG679001). In adopting this Order, the Regional Board found that discharges of potable water potentially contain certain constituents that threaten to cause or contribute to excursions above narrative and numeric water quality objectives.

⁵⁹ SDRWQCB. Letter to Wayne Spencer regarding Discharge of Potable Water to Surface Waters and Storm Drains. February 27, 2004.

Requirement B.2 of tentative Order No. R9-2004-001 lists categories of non-storm water discharges not prohibited under the MS4 permit. However, the authorization under Requirement B.2 is conditioned that neither the permittee nor the Regional Board identifies the discharge category as a source of pollutants to waters of the U.S. Considering the Regional Board finding referenced in the preceding paragraph, potable water discharges that do not comply with the requirements specified in Order No. R9-2002-0020 are a source of pollutants to surface waters.

Please note that these provisions are not new, but are consistent with Order No. 98-02, the current requirements for discharges from the municipal separate storm sewer systems (MS4) in the upper Santa Margarita Watershed."

Section F – Development Planning

77. Comment - Section F - Development Planning (Verbal – David Hogan, City of Temecula):

If we decide to rebuild parts of Jefferson, we can't. It's in a built urban environment. We just can't just take out what's there, rebuild the basin, and work back up again. I would not relish trying to tell the mayor and council, I'm sorry the Regional Board says we can't fix this road".

Response:

The tentative Order does not prevent the Permittees from conducting redevelopment such as rebuilding roads. The tentative Order requires that as part of the process for a redevelopment project, structural treatment best management practices be developed and installed unless treatment control BMPs are infeasible. For example, in the case of a road project that would add or replace at least 5,000 square feet of impervious surface, the Permittees might consider this project as an opportunity to install storm drain inlet filters as their treatment BMPs for reducing pollutants in storm water runoff from the road.

78. Comment - Section F - Development Planning (City of Temecula):

Various provisions of the Tentative Order require the City to modify its General plan, land use ordinances, and CEQA process. In the Clean Water Act, Congress recognized that land use was a local matter. Land use planning and zoning lie in the hands of the local governments, and local governments have discretion to determine the content of their land use plans and to choose how to implement those plans. Despite Federal and State policy, the Tentative Order infringes on the authority of local governments to determine the content of their land use plans and how to implement them. The City does not believe that the Regional Board has the authority to impose such requirements. Therefore, the City requests additional discussions with the Regional Board to resolve this issue.

The City of Temecula does not believe that submitting ordinances associated with the adopted SUSMP is an appropriate request. The intent of the Tentative Order encompasses NPDES compliance and enforcement through local mechanisms. Local enforcement mechanisms to support the Tentative Order, such as ordinances, should be decided by each permittee. As

written, the language conveys that the Regional Board has oversight authority over ordinances. The City request this language be removed or revised.

Response:

The tentative Order does not attempt to provide the SDRWQCB with land use authority and does not restrict the location or type of development. This authority resides with the Permittees. The SDRWQCB, however, does have the legal authority to require development within the Permittees' jurisdiction and land use authority to address water quality and reduce pollutants to the MEP.⁶⁰ Also, the SDRWQCB has the legal authority to require the Permittees' plans to include considerations of the water quality impacts caused by urban runoff. The tentative Order, however, includes examples, principles, policies, and questions to be considered in the Permittees plans and CEQA review process but does not establish specific requirements. The SDRWQCB does have the legal authority to require the Permittees to have the adequate legal authority to implement and enforce the requirements in the tentative Order including SUSMPs.⁶¹

79. Comment - Requirement F. 1- Assess General Plan (Construction Industry Coalition on Water Quality):

The use of the words minimize, maximize and reduce are overly broad and subject to wide discretion and problematic enforcement. We suggest inserting the wording "to the extent technically and economically feasible" after each of these words. In addition, the requirement to minimize the amount of impermeable surfaces may have the unintended consequence of creating urban sprawl and decreasing the amount of housing that will become available in the future. To create less impermeable surfaces will potentially lead developers to build with lower densities in outlying areas, thus flying in the face of high density "smart growth" development that attempts to address the housing supply issue with minimal impact to open space. Item 7 attempts to regulate traffic resulting from development. This is another example of the regional board's attempt to supercede local land use control. Traffic considerations, as well as water quality and environmental concerns are already addressed through the CEQA process and are unnecessary, and in fact illegal, in this Permit. Item 8 is an example of a water quality based effluent limit (WQBEL) requirement and is without legal standing and merit (see General Issues section for detailed analysis).

Response:

MEP as defined in the tentative Order includes an explicatory statement that to achieve the MEP standard, municipalities must employ whatever BMPs are technically feasible and are not cost prohibitive. This overarching statement applies throughout the tentative Order.

The concern that minimizing impermeable surfaces will promote urban sprawl is specious. The principles of low impact development (LID) do not promote low density development over high density development. LID is grounded in a core set of principles based on the idea that storm water management should not be seen as storm water disposal and that numerous opportunities exist within the developed landscape to control storm water runoff close to the source.⁶² Many

⁶⁰ Page 32, Draft Fact Sheet/Technical Report, December 15, 2004

⁶¹ Page 28, Draft Fact Sheet/Technical Report, December 15, 2004

⁶² Prince George's County, Maryland Department of Environmental Resources Programs and Planning Division, Low-Impact Development Design Strategies: An Integrated Design Approach, June 1999; Shaver, E., Low Impact Design Manual for the

LID practices, including bioretention, are good for urban retrofit projects since they are easily integrated into existing infrastructure, like roads, parking areas, buildings, and open space.⁶³

The SDRWQCB concurs that many water quality issues should be addressed through the CEQA process, and the SDRWQCB expects the Permittees to be doing so, if not already, certainly after they review the suggestions listed within Section F of the Order. These suggestions are simply examples of policies and principles that could be considered by the Permittees. The specific contents of Permittees plans and how they address water quality are at the Permittees discretion.

**80. Comment - Requirement F.2 - Modify Development Project Approval Processes
(Construction Industry Coalition on Water Quality):**

We are very supportive of the establishment of fair, consistent and enforceable water quality regulations that also consider the need to develop housing, however several of these requirements are open to very inconsistent interpretation, implementation and enforcement. This inconsistency is caused by the use of such words as implement, maximize, minimize, slow and ensure without guidance as to what constitutes compliance. For example, how would a project proponent ensure long-term maintenance of BMPs. They can only ensure maintenance up until the time that the property is sold. After that, they no longer have jurisdiction over the property or the BMPs. It is not the role of the original property owner to be responsible for the actions of all future property owners. This would be the same as requiring an automobile dealership to be responsible for the ongoing maintenance of all the vehicles that it sells.

Response:

No changes to the tentative Order are necessary in response to the comment. MEP as defined in the tentative Order includes an explicatory statement that to achieve the MEP standard, municipalities must employ whatever BMPs are technically feasible and are not cost prohibitive. This overarching statement applies throughout the tentative Order.

The tentative Order provides a minimum framework for the Permittees to work within, but gives them flexibility to implement the requirements. The tentative Order has been developed with extensive public comment and specific wording is based on this input and is designed to give the Permittees flexibility. The tentative Order does not require that a developer be responsible for long-term maintenance of a BMP. The tentative Order requires that a mechanism be in place to ensure that post construction BMPs are maintained. This is necessary to ensure that the pollutant reduction functions of BMPs are maintained as designed and that the MEP standard continues to be met.

81. Comment - Requirement F.2.b - SUSMP (Verbal – Jason Uhley, District):

The Santa Ana permit allows flexibility to waive SUSMP requirements if environmentally-friendly site designs are incorporated into a development. Maybe there's an alternative way that

Auckland Regional Council, Auckland Regional Council, New Zealand, April, 2000; Weinstein, N., Feasibility Study Assessing Low Impact Development Lot Level Controls in Urban Areas with Combined Sewer Systems, Low Impact Development Center, Beltsville, Maryland, unpublished draft, 2001.

⁶³ <http://www.main.nc.us/riverlink/content/12chap/chap12.htm>

you don't have to require these technical design criteria. We would like to see the same flexibility written into this permit.

Response:

The tentative Order encourages the use of site design BMPs to minimize the introduction of pollutants and conditions of concern from Priority Development Projects (defined in Section F.2.b of the tentative Order). Requirement F.2.b.4 allows the Permittees to develop any equivalent method for calculating the volume or flow that must be mitigated. The equivalent method may include considerations for "environmentally-friendly site designs," if by this term it is meant that site design measures that will reduce the amount of storm water runoff that must be treated structurally. Any equivalent sizing criteria must be authorized by the SDRWQCB.

82. Comment - Requirement F.2.b - SUSMP (District, January 28, 2004 & March 10, 2004):

As described in the position paper regarding the compliance schedule, although the SUSMP can be developed in one year, an additional nine months will be required for the Permittees to adopt needed ordinances and to implement this program. The revised Tentative Order proposes a revised compliance schedule consistent with the need for additional time for implementation. As the existing programs addressing new development have been effective in managing urban runoff, the requested modification to the compliance schedule will not impact receiving water quality.

83. Comment - Requirement F.2.b - SUSMP (Construction Industry Coalition on Water Quality):

We find it inappropriate that the other Permittees under the jurisdiction of the San Diego Regional Water Quality Board faced with the implementation of similar, if not identical requirements were given a year and a half in which to implement the SWMP requirements. We see no reason why the Permittees and the development community within the Santa Margarita Watershed not be given the same year and a half in which to implement the SWMP requirements. These requirements will be a drastic departure from the current set of rules. In addition, we feel that it is very important that all Permittees and project applicants understand and are consistent with language that addresses projects that have already received prior approvals. Therefore, we recommend the following language, "where new development is defined as projects for which tentative tract or parcel map approval was not received by October 1, 2005 and new re-development is defined as projects for which all necessary permits were not issued by October 1, 2005. However, projects that have not commenced grading by the initial expiration date of the tentative tract or parcel map approval shall be deemed a new development project as defined in this section. New development does not include projects receiving map approvals after October 1, 2005 that are proceeding under a common scheme of development that was the subject of a tentative tract or parcel map approval that occurred prior to October 1, 2005

Response to Comment Nos. 82 and 83:

No changes were made to the requirements of the tentative Order in response to these comments. The 640 days for SUSMP development and implementation requested by the Permittees is not

supported by the Permittees comments.⁶⁴ The 365 days in the tentative Order is sufficient for the Permittees to modify their current new development requirements and processes to implement SUSMPs requirements because:

Comment: Page: 1
Where in the record?

- a. There is not a need to expend the Permittees limited resources on development of a brand new SUSMP when multiple SUSMP examples are available to the Permittees that could be tailored to meet the local processes and requirements of Riverside County.⁶⁵
- b. Two of the Permittees will already have requirements that are similar to the SUSMPs before the 365 days. The Santa Ana Regional Board MS4 Permit has requirements for Riverside County and City of Murrieta to develop and have the authority to implement SUSMP-type requirements by January 2005, well before the compliance date in the tentative Order.⁶⁶
- c. The Permittees appear to already have the authority to require post construction requirements like SUSMPs. Riverside County's current storm water ordinance states "New development or redevelopment projects shall control stormwater runoff so as to prevent any deterioration of water quality that would impair subsequent or competing uses of the water. The Director of TLMA [County of Riverside Transportation and Land Management Agency] shall identify the BMP's that may be implemented to prevent such deterioration and shall identify the manner of implementation".⁶⁷ This ordinance and the other Permittee ordinances, which are similar, already give the Permittees the ability to designate BMPs and requirements for new development.

Although the Permittees have 365 days to develop and implement the SUSMPs, the Permittees cannot wait until the end of this period to require post construction structural treatment BMPs. Requirement F.2.b of the tentative Order specifies that projects undergoing approval (with no lawful prior approval) must incorporate post construction structural treatment BMPs where feasible. The expectation is that Permittees will be required to implement these structural BMPs through their DAMP and/or WQMP process until the SUSMPs are fully implemented.

84. Comment - Requirement F.2.b.(1).g - SUSMP Categories (District, March 10, 2004):

Remove the 15 or more parking spaces criteria due to the variability of parking space size.

Response:

Comment noted and change has been made. The Permittees will be limited to using the 5,000 square foot threshold when determining SUSMP applicability.

85. Comment - Requirement F.2.b.(1).i - RGOs (District, March 10, 2004):

⁶⁴ Pages 1-3, Santa Margarita Region MS4 Permit Compliance Schedule submitted as an attachment to a letter dated January 28, 2004 from Riverside County Flood Control and Water Conservation District

⁶⁵ Page 34, Draft Fact Sheet/Technical Report, December 15, 2003

⁶⁶ Santa Ana Regional Board Order No. R8-2002-0011, Section VIII.B

⁶⁷ Riverside County Storm Water Ordinance No. 754

Remove Retail Gasoline Outlets (RGOs) as a Priority Development Project Category per direction by the San Diego Regional Board Chairman during the February 11, 2004 board meeting.

Response:

RGOs remain listed in Section F.2.b.(1).i. Further review of the supporting documents for SWRCB WQ 2001-15 verifies that the SDRWQCB has followed the direction from the SWRCB WQ 2001-15 (Appeal of the San Diego MS4 Permit) in developing the tentative Order by including a specific finding (Finding 23) identifying RGOs as potential significant sources of pollutants, by providing a discussion of RGOs in the Fact Sheet⁶⁸, and prescribing a size threshold⁶⁹. In addition, further review of the record noted that the inclusion of RGOs was subsequently addressed by the SWRCB through the appeals of the MS4 Permits for the Los Angeles and San Francisco Regional Boards that included RGOs as a priority development category. The SWRCB held a workshop⁷⁰ that identified RGOs as significant sources of pollutants and dismissed the petitions for removal of the RGOs in the permits.⁷¹ The Western States Petroleum Association, who filed the appeals on RGOs, did not comment on the tentative Order. Finally, the SWRCB adopted a General Permit for the Discharge of Storm Water from Small MS4s (WQ Order No. 2003-0005-DWQ) including RGOs as a priority development category.

86. Comment - Requirement F.2.b.(1).i - RGOs (Verbal – Evan McGinley, Richards/Watson/Gershon):

There are no studies documenting that RGOs are a significant source of pollutants in Southern California or the Santa Margarita watershed.

Response:

There have not been any specific studies that RGOs are a significant source of pollutants within the Santa Margarita watershed. However, the record supports that RGOs are potential significant sources of pollutants and should be a priority development category in SUSMPs.⁷² The Permittees have not documented that the RGOs within the Santa Margarita are different from other areas and do not need similar requirements. In addition, the inclusion of RGOs as a priority development category has been addressed by the SWRCB through the dismissal of appeals of the MS4 Permits for the Los Angeles and San Francisco Regional Boards. The Western States Petroleum Association, who filed the appeals on RGOs, did not comment on the tentative Order. Finally, the SWRCB adopted a General Permit for the Discharge of Storm Water from Small MS4s (WQ Order No. 2003-0005-DWQ) includes RGOs as a priority development category.

87. Comment - Requirement F.2.b.(2) - BMP Requirements (District, March 10, 2004):

Add wording in the section to allow regional treatment controls.

Response:

⁶⁸ Page 35, Draft Fact Sheet Technical Report Dated December 15, 2003

⁶⁹ Requirement F.2.b).(1).(i) of tentative Order

⁷⁰ SWRCB Workshop, July 2, 2002

⁷¹ LARWQCB. February 2004. Emails from Dan Radulescu.

⁷² Page 35, Draft Fact Sheet/Technical Report & SWRCB RGO Workshop, July 2, 2002

No change has been made in the tentative Order to allow regional BMPs. The use of receiving waters to transport waste is prohibited.⁷³ Treatment of runoff must occur prior to discharge into receiving waters, but sharing BMPs from multiple developments is allowed by the tentative Order. Changes were made in response to these comments to clarify where structural BMPs can be located and provide a definition of shared BMPs.

88. Comment - Requirement F.2.b.2 - BMP Requirements (Construction Industry Coalition on Water Quality):

It does not make sense to use small collection strategies located at, or as close as possible to, the source for areas where economies of scale make it much more technically, economically and environmentally beneficial to use regional/watershed multi-use solutions (such as parks and ball fields), located prior to discharging into a Water of the U.S., that would be better designed and maintained.

We also do not support the total reliance of this Permit on SUSMP provisions. Instead we support creating a process that promotes regional mitigation facilities to protect water quality from both new-development and existing development. The SWRCB, in response to a petition regarding the Standard Urban Storm Water Mitigation Plans (SUSMPs) portion of the Los Angeles MS4 Permit, issued Order No. WQ 2000-11. In this Order the SWRCB states, "As a long-term strategy, municipal storm water dischargers should work to establish regional mitigation facilities, which may be more cost-effective and more technically effective than mitigation structures at individual developments." Instead of promoting regional mitigation facilities, this Permit contains SUSMP language that is not in line with the previous direction outlined in Order No. WQ 2000-11. Rather than imposing inappropriate SUSMP requirements, we urge the Board to allow the local communities the incentive to develop regional mitigation programs and the opportunity to shape the development of post-construction design standards on a local level so that meaningful programs will be implemented and will complement, rather than usurp, the existing land use regulatory processes. Where technically and economically justified, these programs will focus on regional mitigation facilities, in lieu of mitigation structures at individual developments. As outlined in the attached Brown and Caldwell's April 2003 study entitled, "Regional Solutions for Treating Stormwater in Los Angeles County: A Macrofeasibility Study", regional mitigation facilities have the following goals and benefits:

1. Water Quality Improvements

- a. Treat storm water from existing development as well as new development and redevelopment
- b. Regional, or watershed, facilities can be optimally located and sized to reduce pollutant loads from all tributary areas
- c. Regional, or watershed, facilities can address both dry-weather flows and wet weather flows
- d. Regional, or watershed, facilities can enhance water quality to a greater degree by providing larger areas for more highly effective, land-intensive treatment methods, such as filtration technologies

⁷³ Finding 16 of the tentative Order & Page 36, Draft Fact Sheet/Technical Report, dated December 15, 2003

- e. Regional, or watershed, facilities can be more easily upgraded to meet future water quality regulations
- f. Regional, or watershed facilities treat an entire sub-watershed and not just new development, or redevelopment, thus overall improvements in water quality can be realized more quickly
- 2. Cost-effectiveness
 - a. Regional, or watershed facilities are inherently more cost-effective to construct and maintain
 - b. Economies of scale enable greater pollutant reductions for the capital and ongoing operation and maintenance costs expended.
- 3. Long-term Maintenance
 - a. Surveys of maintenance effective of on-site facilities on private land have shown that the majority were failing due to lack of maintenance
 - b. Regional, or watershed facilities have a much higher likelihood of being maintained properly so they operate in perpetuity
- 4. Beneficial reuse of stormwater
 - a. Urban runoff is increasingly being viewed as a potential resource, especially given the water supply challenges that California currently faces
 - b. Regional, or watershed facilities offer the flexibility for future enhancements that would support integrated resource planning and make better overall use of limited water supplies
- 5. Multiple uses
 - a. Because of their larger size and jurisdiction, regional, or watershed facilities present more opportunities to serve multiple purposes
 - b. Regional, or watershed, facilities can often provide other values, such as, habitat improvements, public park and/or recreation facility creation or enhancement, and green space preservation (CICWQ, January 28, 2004)

Response:

No change has been made in the tentative Order to allow regional BMPs. The use of receiving waters to transport waste is prohibited.⁷⁴ Treatment of runoff must occur prior to discharge into receiving waters, but sharing BMPs from multiple developments is allowed by the tentative Order. Changes were made in response to these comments to clarify where structural BMPs can be located and provide a definition of shared BMPs.

89. Comment - Requirement F.b.2.(2) - BMP Requirements (Construction Industry Coalition on Water Quality):

The Permit directs permittees to “minimize storm water pollutants of concern in urban runoff,” as well as, “be effective at removing or treating pollutants of concern associated with the project.” Neither of these requirements considers feasibility, costs, or any other factor used to define MEP. A literal reading of these requirement mandates project proponents to produce pristine drinking water from their project. All discussions of pollutant removal should focus on the reduction of pollutants to the MEP. The Permit directs permittees to “ensure that post-development runoff does not contain pollutant loads which cause or contribute to an exceedance

⁷⁴ Finding 16 of the tentative Order & Page 36, Draft Fact Sheet/Technical Report, dated December 15, 2003

of water quality objectives.” This requirement is discussed at length in the “General Issues” section of this letter. In summary, the Regional Board has made no showing that any of these unqualified directives are consistent with MEP. Thus, these unqualified, absolute directives should be stricken from the Permit or somehow made to conform with the MEP standard. The last sentence of this section states that “under no circumstances can a BMP be constructed in a receiving water”. This statement is completely without legal foundation and in fact removes one of the most cost-effective solutions available for protecting beneficial uses in the Waters of the U.S. These solutions are multi-use regional solutions that would address the pollutants of concern in urban runoff prior to its discharge into Waters of the U.S. Therefore, this last sentence should be stricken.

Response:

No changes are recommended to the tentative Order. MEP, as defined in the tentative Order, includes an explicatory statement that to achieve the MEP standard, municipalities must employ whatever BMPs are technically feasible and are not cost prohibitive. This overarching statement applies throughout the tentative Order. The requirements in the tentative Order represent what the SDRWQCB considers necessary to meet MEP and provides a minimum framework for the Permittees to work within. However, the specific BMPs used to meet the requirements of the tentative Order are at the discretion of the Permittees. As discussed in Finding No. 16 of the tentative Order (Finding No. 18 of the revised tentative Order), the use of BMPs within a receiving water would allow waste transport or waste assimilation that is not in compliance with federal regulations 40 CFR 13413.10(a). The SDRWQCB finds that treatment of urban runoff prior to discharge to receiving waters is MEP.

90. Comment - Requirements F.2.b.(2).(a) & F.2.b.(9) - Downstream Erosion (District, March 10, 2004):

The revised Tentative Order proposes referencing the design criteria for control of velocities, volumes, durations, and peak rates in provision F.2.b)(2)(a) to the numeric sizing criteria guidelines in Provision F.2.b)(3). This would make it clear that the Permittees objective is to protect from erosion and habitat loss during common rainfall and flooding events. More extreme events, such as the floods of 1993, where more complex processes come into play, would not be regulated under these provisions. It should be noted that there are areas in the Santa Margarita Region where, due to channel stabilization or other considerations, control of velocities, volumes, duration and peak rates is not needed for downstream erosion and habitat maintenance and protection as proposed in Provision F.2.b)(2)(a) and F.2.b)(9) of the Tentative Order. To recognize this, the revised Tentative Order proposes that these controls will be implemented where needed.

Response:

Comment noted, and no changes to the tentative Order are necessary. As part of the SUSMP, the Permittees are required to ensure that each priority development project does not increase downstream erosion and to protect stream habitat. However, this requirement is not based on the volume/flow determined in the numeric sizing criteria for structural BMPs. It is based on the post construction runoff from the project. It is up to the Permittees to provide the specific requirements and BMPs to meet these requirements of the tentative Order including what is the appropriate storm event that must be controlled. The Permittees are encouraged to use any

existing programs to meet these requirements and should provide detail on how these programs are implemented in the SUSMPs. It is expected that the Permittees will utilize information from studies that are conducted on numeric criteria to prevent downstream erosion and incorporate them into the development of their own numeric criteria by 2009.

91. Comment - Requirement F.2.b(3) - Numeric Sizing Criteria (District, March 10, 2004):

The Permittees request that Board staff meet with us to review, and clarify, the language used to describe the flow and volume based BMP numeric-sizing criteria established above. The terminology used, although consistent with precedential language by the State, is not consistent with the referenced documents. This is confusing. For example, Requirement F.2.b.3., volume based BMPs, 2. Directs the Permittees to determine the 85% 24 hour rainfall event, determined using equations described in the WEF Manual of Practice. However, the equations and methodology referenced in the WEF manual are actually based on an analysis of maximized RUNOFF volume (not rainfall depth). The methodology requires an analysis of the entire rainfall record to determine the number of events that would generate runoff. The "knee of the curve" calculations are based on the resulting runoff events. There is not a linear relationship between the 85% rainfall event and the 85% runoff event, based on the WEF methodology. For these reasons, the initial reference to the 85% rainfall event is in error and should actually be referencing the 85% runoff event. There are also other minor errors including improper definitions of terms (does "storm event" refer to rainfall or runoff analysis, for example?), and clarifications about implicit assumptions. For example, what defines an independent storm event? There are several assumptions that the Permittees could make, the results of which could reduce or increase the required treatment volume by a factor of 2 in some cases. The State Water Quality Control Board Phase II Permit should be reviewed for additional guidance.

Response:

Comment noted and changes clarifying the requirements in the tentative Order have been made. As indicated in the draft Fact Sheet, additional clarification and examples of calculations to determine the amount of runoff that must be treated can be found in the SDRWQCB SUSMP Staff Report developed for the San Diego MS4 Permit and the Model Water Quality Management Plan developed by the County of Orange.

92. Comment - Requirement F.2.b.(3).(a).(iii) - Numeric Sizing Criteria (District, March 10, 2004):

In the California Stormwater Quality Association (CASQA) California Stormwater BMP Handbook, January 2003 (CASQA handbook) Section 5.5.1, the treatment runoff for volume-based BMPs uses eighty (80)% of the volume of annual runoff using local rainfall data. Please revise Section F.2.b.3.a.iii to reflect 80% volume treatment as referenced in the CASQA handbook. This change is consistent with the language contained in State Board WQO 2003-0005-DWQ Attachment 4.

Response:

No changes to the requirements in the tentative Order are necessary. The use of 90% volume treatment (in contrast to 80%) was used to ensure that the calculations for treatment volume were equivalent to the other options for numeric sizing criteria in the tentative Order. Example calculations for the numeric sizing criteria are included in the San Diego SUSMP Staff Report

developed for the San Diego MS4 Permit. These calculations demonstrate that the volumes determined by the various options are similar.

93. Comment - Requirement F.3 - Environmental Review (District, March 10, 2004):

Provision F.3 of the revised Tentative Order proposes text to clarify that applicability of the Provision is to runoff from proposed New Development and Significant Redevelopment projects.

Response:

Comment noted and the tentative Order has been modified to clarify that the section includes all development projects requiring CEQA review.

94. Comment - Requirement F.2.b.8 - Infiltration and Ground Water Protection (Construction Industry Coalition on Water Quality):

Requiring pretreatment prior to the use of all infiltration BMPs is not consistent with most design standards available for the installation of infiltration BMPs. Pretreatment has not been found necessary in most instances. The need for pretreatment should be determined on a case-by-case basis, and left to the local permitting agency to decide. In fact, as far as we can tell, the San Diego Regional Water Quality Control Board is the only Regional Board in Southern California with this requirement. The requirement for dry weather flows to be diverted from infiltration devices does not make sense either, as runoff from irrigation systems, footing drains, rising ground water, springs, etc. are allowable dry weather flows and should definitely be designed to flow through the infiltration device as opposed to the street. It makes a lot more sense to infiltrate these flows, and let them replenish groundwater, than to just let them discharge into the street

Response:

No changes are necessary in response to this comment. The restrictions for use of infiltration BMPs were taken directly from EPA guidance, but the Permittees may develop alternative restrictions as part of their SUSMP.⁷⁵ The alternative restrictions need not be identical to the conditions listed and may take into account case-by-case situations.

Section G - Construction Program

95. Comment (Verbal – Alex Gann, County of Riverside):

In the past, construction was a significant issue prior to the development of the MS4 program, but our current construction program is a published success as documented by an article in Storm Water Magazine.

Response:

The article referenced by the commenter was written by Riverside County staff and has not been peer-reviewed.

96. Comment (City of Temecula):

The Tentative Order is requiring the City to assist in enforcing the State General permit for construction activities. In principle, the City shares the same goals of water quality as the

⁷⁵ Page 38, Draft Fact Sheet/Technical Report, December 15, 2004

Regional Board, however, the City does not agree with collateral assistance without an equitable reimbursement mechanism, especially since the SWRCB receives and retains all fees from the permitted construction activities and does not conduct visits at all sites. The Tentative Order requires the City to inspect construction sites that are already covered by State-issued permits. The Regional Board is supposed to inspect these sites, and state law does not allow it to delegate this authority. The City request further discussions to reach a mutually agreeable solution to this discrepancy

Response:

No change to the requirements in the tentative Order is necessary to address this comment. Other than ensuring construction sites over 1-acre have a NOI, the Permittees do not assist the SDRWQCB in enforcing the General Construction Permit. The Permittees are responsible for enforcing their own ordinances and ensuring that minimum BMPs appropriate for their jurisdiction are implemented at construction sites. The SDRWQCB is solely responsible for the enforcement of the General Construction Permit including the development and implementation of a SWPPP. The system of dual State and local regulation of construction sites is addressed in the Draft Fact Sheet/Technical Report in Section VII.E. In addition, the tentative Order is not the appropriate mechanism to request local reimbursement of fees collected for the General Construction Permit.

97. Comment - Requirement G.2 - Grading Ordinance Update (District, January 28, 2004 & March 10, 2004):

The tentative Order should be changed to allow 640 days for the review and update of the grading ordinances to allow for local procedural requirements.

Response:

Requirement No. G.2 has been modified to extend the deadline to 365 days for the review and update of the grading ordinance. The change provides the Permittees with six additional months to make minor changes in their grading ordinances that may be necessary for the Permittees to require year around BMPs, phased grading, and other minor requirements at construction sites. The Permittees contend that they could not reasonably implement this program within the prescribed compliance schedule with available staff resources.⁷⁶ The Permittees did commit to reviewing their ordinances within 6 months of Permit adoption, and as necessary, revise these ordinances and certify legal authority within 18 months of permit adoption.⁷⁷ The County of Riverside has recently updated and the Cities of Murrieta and Temecula are in the process of updating their grading ordinances.⁷⁸ These updates will provide the Permittees with the authority to require and enforce BMPs at construction sites prior to the next rainy season. The additional six months is not intended to allow for delay of the adoption of the Permittees grading ordinances and delay their authority to require BMPs during the next rainy season.

⁷⁶ Page 3 of *Santa Margarita Region MS4 Permit Compliance Schedule* submitted as an attachment to a letter dated January 28, 2004 from Riverside County Flood Control and Water Conservation District

⁷⁷ ROWD

⁷⁸ Santa Ana Regional Board Order No. R8-2002-0011, Section VIII.A.10 and discussions with Joe Stone and Aldo Lacitra of the City of Temecula on January 23, 2004

98. Comment - Requirement G.3.a - Modify Construction and Grading Approval (District, March 10, 2004):

The language of Provision G.3.a is confusing to the Permittees. Several Permittees believe that this language requires them to review and approve SWPPPs, or a document that would effectively duplicate a SWPPP. The Permittees are concerned that this would lead to increased cost and confusion, not only for the developers, but also for the Permittees.

The Permittees proposed the following alternative language for Provision G.3.a, which they believe is consistent with 40 CFR, the cited EPA guidance, and the intent of the Permit Provision be incorporated into the Permit:

a) Review site plans prior to groundbreaking to ensure measures are taken to manage stormwater and non-stormwater discharges from the site at all times

Response:

No change has been made to Requirement G.3.a in response to this comment. The tentative Order neither directs the Permittees to enforce the requirements of the Statewide General Construction Permit nor review and approve the Storm Water Pollution Prevention Plan. The intent of this requirement is for the developers to have a erosion and sediment control plan to ensure compliance with the minimum construction requirements established by the Permittees. The form and specific content of the plan is up to the discretion of the Permittees. Using the site plans that describe the applicable erosion and sediment control measures could satisfy this requirement but the Permittees are not limited to this method. For example, some Permittees in San Diego County and Orange County require development of a local SWPPP.

99. Comment - Requirement G.3.d - Modify Construction and Grading Approval (Verbal – Joe Stone, City of Temecula):

Regarding requirement G.3.d, the use of the term “never” does not allow for consideration of the type of construction or any site-specific conditions. For example, erosion control is absolutely impractical for road improvement projects. Although we agree with the perceived intention of this provision, the Permittees are requesting that provision d [Requirement G.3.d] either be revised or omitted from the tentative Order as provision c [Requirement G.3.c] does address this concern.

Response:

No changes are necessary to the tentative Order. To reduce the discharge of sediment to the MEP, both erosion control and sediment control BMPs are needed at a construction site. Sediment control BMPs alone are not effective as supported by the State General Construction Storm Water Permit requirements for an effective combination of both sediment and erosion control BMPs. However, the extent of erosion control BMPs required for a site is at the discretion of the Permittees. In the example road project cited by the commenter, erosion control BMPs may only be practicable on inactive flat areas/slopes and stockpiles.

100. Comment - Requirement G.4 - Source Identification (District, January 28, 2004 & March 10, 2004):

Construction databases – The Permittees comment that the definition of “construction site” in the tentative Order is overly broad and should be limited to activities including the clearing, grading and excavating that result in land disturbance of equal to or greater than one acre. Substantial modification of existing tracking systems would be needed to track required inspections and enforcement actions related to construction sites as required in the tentative Order.

Response:

A change to the definition of construction site has been made to clarify that for the purpose of the construction component of this Order, construction sites would be limited to those involving soil-disturbing activities. The Permittees’ existing tracking systems/databases can provide an inventory of these sites that have grading and/or building permits to meet the requirements of Section G of the tentative Order. The inventory requirements in the tentative Order are less burdensome than those required by the Santa Ana MS4 Permit.⁷⁹

101. Comment - Requirement G.5.(2) - BMP Implementation (District, March 10, 2004):

Under appropriate conditions and with the implementation of appropriate controls, grading during the wet season need not be prohibited. Remove Section G.5.(2) that requires seasonal restrictions on grading.

Response:

The seasonal restriction on grading has been removed from this section of the tentative Order. It is not the intent of the tentative Order to deny grading during the wet season, but rather to minimize the amount of exposed soil during this period and require implementation of BMPs.

102. Comment - Requirements G.5.(6) & (7) - BMP Implementation (District, March 10 2004):

It is not always feasible to preserve riparian buffers and natural hydrologic features. Reword these sections to include where feasible.

Response:

Comment noted. Section G.5.(6) and (7) have been changed to include “where feasible”.

103. Comment - Requirement G.5 - BMP Implementation (Construction Industry Coalition on Water Quality):

Nearly all of these requirements are beyond the mandate of the General Construction Activities Stormwater Permit (GCASP) and are extremely burdensome and overly vague, so as to create an extreme hardship to the building and construction industries. This is due to the impact on the ability to provide housing and also the loss of jobs that will occur, especially by enforcing the “minimize” grading component which requires all. Permittees to ensure that seasonal restrictions on grading occur at all construction sites (Section G.5.a.2). This requirement, and in fact many aspects of this Permit seek to override all operative provisions of the GCASP, forcing enforcement responsibility for compliance onto the municipal permittees. Rather than following the USEPA guidance anticipating coordination of the state-administered programs, this Permit does not seek to “coordinate” with the GCASP, but rather

⁷⁹ Santa Ana MS4 Permit No. R8-2002-0011, Section IX, A.1

alters its most fundamental provisions and requirements. The result is inconsistent standards in this region from the rest of the state. Inconsistent standards result in uncertainty in implementation, enforcement, and regulated community understanding of its obligations from one site to the next. While the provisions of this Permit state that its provisions should be enforced along with those of the GCASP, such duplicative and inconsistent regulation is contrary to the provisions of the GCASP itself, which, as a State Board Order, will control. Specifically, the GCASP provides: "RWQCBs shall: . . . [] . . . b. Issue permits as they deem appropriate to individual dischargers, categories of dischargers, or dischargers in a geographic area. Upon issuance of such permits by a RWQCB, the affected dischargers shall no longer be regulated by this General Permit." (SWRCB WQ Order No. 99-08-DWQ, p. 7, D.1.b.)

By adopting this Permit, this Regional Board is issuing a permit they appear to deem appropriate both for a "category of dischargers" as well as "dischargers in a geographic area." Accordingly, by the express terms of the GCASP, adoption of the Permit in this regard will automatically nullify the responsibility of regulated entities to comply with the GCASP. This is an outcome we believe this Regional Board did not intend; nor is it an outcome we believe is appropriate.

But whether intended or not, this will be the effect of adoption of the Permit as written. (Below, we address the specific ways in which the Permit's "Development Construction Program" departs from the GCASP.) By superceding the GCASP for this region through the MS4 permit, the Regional Board abandons what has been a well-functioning, statewide system of uniform requirements, implementation, and – usually – enforcement. We do not believe the State Board will be anxious to abandon this system and accept differing implementation and enforcement standards, region by region. There is no evidence in the record that the Santa Margarita watershed has such unique circumstances that a region-wide abandonment of the GCASP is appropriate. If this Regional Board feels that the GCASP is deficient generally, then the appropriate course of action is to seek amendment of the GCASP by the State Board, not abandon the GCASP without just cause or an adequate evidentiary foundation.

How will this be enforced anyway? Besides, there is no justification for an arbitrary, blanket prohibition of this sort under any circumstances. Although there may be a higher potential of sediment runoff from grading construction sites during the rainy season, it should not be assumed that these sites would automatically result in water quality violations. These sites should require the implementation of BMPs necessary to keep sediments on site, but should not be restricted from grading during the rainy season. If grading were disallowed during the rainy season, it would have a major impact to the building and construction industries. Not only would this cause many workers to be without employment during the rainy season, it would cause projects to take substantially longer to complete, thus increasing the cost of the project and the ultimate cost to the consumer. This would have the effect of putting more people out of reach of the American Dream, home ownership.

Response:

Requirement G.5.(2) has been removed in response to the comment. It is not the intent of the tentative Order to deny grading during the wet season, but rather to minimize the amount of exposed soil during this period and require implementation of BMPs.

No change has been made Requirements G.5 in response to the comment. The Requirements in G.5 do not require the Permittees to implement and enforce the Statewide General Construction Permit. The requirements in the tentative Order do provide a minimum framework for the Permittees to work within to develop their own local program to ensure BMPs are implemented at construction sites by enforcing their own ordinances.⁸⁰ The Permittees establish and enforce minimum BMPs for construction sites that are appropriate for their jurisdiction. The system of dual State and local regulation of construction sites is addressed in the Draft Fact Sheet/Technical Report in Section VII.E.

104. Comment - Requirement G.6 - Inspection of Construction Sites (District, March 10, 2004):

Provision G.6 specifies the frequency of inspection of construction sites. As described in our presentation at the hearing on February 11, the inspection priority and inspection frequency should be based on the assessment of the potential threat to water quality. This section of the revised tentative Order proposes text consistent with the Permittees' request to prioritize facilities. The language is based on text from the Permittees' Santa Ana Permit.

Response:

Requirement G.6 has been changed to require "medium" sites to be inspected at least 3 times during the rainy in response to the comment. The change is being made with the idea that the minimum frequencies in the tentative Order are for formal inspections. The SDRWQCB expects that all Permittee inspectors will be adequately trained to assess BMPs and to report noncompliant sites during all types of inspections. The minimum inspection frequency will allow the Permittees to concentrate their effort on noncompliant construction sites that require follow up actions.

105. Comment - Requirement G.6 - Inspection of Construction Sites (San Diego Bay Council):

On the issue of "flexibility" and reduced inspections for high priority construction sites, we ask you to examine this request very critically. It is unclear to us why the Regional Board would reduce the number of inspections in such a rapidly developing area. Our concern focuses on the fact that the request from the inspectors may come from a lack of needed staffing rather than a plan for improved compliance through flexibility. We would ask the Board to examine this issue closely to ensure that protection is not reduced in the very area needing it the most. In San Diego County, the Board is well aware that despite increased enforcement efforts, virtually every jurisdiction experiencing significant construction has numerous sites out of compliance during every single storm event.

Response:

The amount of minimum inspections has been reduced in the tentative Order as compared to the San Diego & Orange County MS4 Permits. This reduction was made with the idea that the minimum frequencies in the tentative Order are for formal inspections. The expectation, however, is that all Permittee inspectors will be adequately trained to identify and report

⁸⁰ Section VIII.G of the Draft Fact Sheet/Technical Report

noncompliant during all types and frequencies of construction inspections. The minimum inspection frequency in the tentative Order will allow the Permittees to concentrate their efforts on noncompliant construction sites that require follow up actions and inspections.

106. Comment - Requirement G.6 - Inspection of Construction Sites (City of Temecula):

The tentative Order inappropriately requires the City to inspect sites less than 1 acre in size. The phase II regulations state “The Phase II Final Rule requires an operator of a regulated small MS4 to develop, implement, and enforce a program to reduce pollutants in storm water runoff to their MS4 from construction activities that result in a land disturbance of greater than or equal to one acre” The tentative Order expands this beyond the requirements of the federal NPDES program by requiring the City to inspect facilities smaller than one acre on an as needed basis. This is effectively an unfunded state mandate and should be removed from the tentative Order.

Response:

No change has been made to Requirement G.6 in response to the comment. Under the current MS4 Order No. 98-02, Provision F.21, the Permittees should already have program in place to require all construction sites, regardless of size, to prevent and control discharges of contaminated runoff from construction sites. The requirements in the tentative Order to require inspections of sites less than 1-acre on an as needed basis and is what SDRWQCB finds necessary to meet MEP.⁸¹

107. Comment - Requirement G.7 - Enforcement of Construction Sites (District, March 10, 2004):

Include the following wording in Requirement G.7:

“If a Permittee determines that lawful prior approval of a project exists, whereby application of ordinance requirements to the project is infeasible, ordinance requirements need not apply to the project.”

Response:

No change has been made to Requirement G.7 in response to the comment. Allowing construction sites not to implement BMPs to the MEP based on vested rights is not appropriate. Please see response to Comment No. 63 regarding vested rights.

Section H.1 – Municipal Program

108. Comment – Requirement H.1.b (District, March 10, 2004):

Change Requirement H.1.b to:

“Each Permittee shall develop, and update annually, an inventory of the name, address (if applicable), and description of all of the Permittee’s municipal facilities and activities that generate pollutants.”

Response:

The requested change has been made.

⁸¹ Page 44, Draft Fact Sheet/Technical Report

109. Comment – Requirement H.1.c.1 (District, March 10, 2004):

Change Requirement H.1.c.1 to:

“Within 365 days from the date of this Order, each Permittee shall implement or require the implementation of BMPs to reduce pollutants in urban runoff to the MEP from all of the Permittee’s municipal facilities and activities.”

Response:

The requested change has been made.

110. Comment – Requirement H.1.d.2 (District, March 10, 2004):

Permittees propose changing the requirement to read:

“Each Permittee shall implement a schedule of maintenance activities for its ~~the~~ MS4. The maintenance activities must, at a minimum, include:

- a. Inspection of all of the Permittee’s catch basins and storm drain inlets at least once a year between May 1 and September 30. If accumulated waste is visible, the catch basin, or storm drain inlet, shall be cleaned out. Additional cleaning shall be conducted as necessary;*
- b. Removal of anthropogenic litter from the Permittee’s open channels at least once a year between May 1 and September 30, with additional removal as necessary;*
- c. Record keeping of the Permittee’s MS4 cleaning activities;*
- d. Proper disposal of waste removed from the Permittee’s MS4 pursuant to applicable laws; and*
- e. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.”*

Response:

The requested changes have been made.

111. Comment – Requirement H.1.e (District, March 10, 2004):

Items 2 and 3 may not be applicable or practical for all situations. “Where feasible” should be added to these two items.

Response:

The intent of Requirement H.1.e is that Permittee programs should include the listed BMPs, but application of specific BMPs at specific sites is dependent upon technical feasibility. The words “to the MEP” have been inserted into the first sentence of Requirement H.1.e to clarify that technical feasibility should be considered. According to the definition of MEP, it is understood that technically infeasible BMPs do not apply. However, it is expected that Permittee programs will include, at a minimum, the BMPs listed in Requirement H.1.e, and that each of the BMPs will be implemented, where feasible.

112. Comment – Requirement H.1.g (District, March 10, 2004):

Permittees propose to change to:

“Each Permittee shall require compliance with the requirements of ~~enforce~~ its storm water ordinance ~~at for~~ all of it’s municipal facilities and activities as necessary to maintain compliance with this Order.”

Response:

The first change is not necessary to clarify the intent of the requirement. The American Heritage Dictionary, Second College Edition defines “enforce” as “to compel observance of or obedience to”. The SDRWQCB expects the Permittees to “enforce” their storm water requirements at municipal facilities using applicable methods. The second and third changes have been made.

113. Comment – Proposed Requirement H.1.h (District, March 10, 2004):

Permittees propose that the SDRWQCB include the State-wide Construction Storm Water Permit requirements in its MS4 Permit so that they could avoid submitting Notices of Intent and paying construction storm water permit annual fees to the SWRCB for all Permittee-owned construction projects.

Response:

No change is recommended for the tentative Order. Permittee-owned construction sites should be regulated the same as the private construction sites within their jurisdiction. The requirement to file a NOI and appropriate filing fee is not overly burdensome, and the fees for small projects (like most public construction projects) have recently been reduced.

The requirement for the Permittees to file an NOI is consistent with the San Diego and Orange County MS4 Permits and most other Regional Boards. Only the Santa Ana Regional Board and Colorado River Basin Regional Board do not require their Permittee construction sites to have coverage under the statewide construction permit. By filing an NOI, the Regional Board has all construction sites in one database for tracking and enforcement.

Section H.2 – Industrial/Commercial Facilities Program

114. Comment (EMWD):

The tentative Order is duplicative where industrial facilities will be required to comply with the General Industrial Permit and the municipal permittee requirements.

Response:

As discussed in Section VII.E of the Fact Sheet, the federal NPDES regulations and EPA guidance call for a coordinated effort, known as dual regulation, to regulate industrial facilities and construction sites. To eliminate duplicate inspections, Section H.2.d.5 of the tentative Order specifies that where the SDRWQCB has inspected a facility during a particular year, the requirement for the Permittees to inspect the facility during the same year will be satisfied.

115. Comment (District, March 10, 2004):

The Compliance Assistance Program (CAP) is an existing program implemented by the Permittees to provide for inspection of priority industrial and commercial facilities under the jurisdiction of the Permittees and provide for education of facility operators. The CAP cost-effectively builds upon existing inspection programs conducted by the Environmental Health Division of the County Health Department. CAP has been successful and discharges of runoff from industrial or commercial facilities have not been identified as a source of water quality impairment in the Santa Margarita Watershed. With the continued implementation of the CAP and the IC/ID program [Illicit Discharge Detection and Elimination Program], this potential source of pollutants will remain effectively controlled.

Response:

The intent of the Industrial/Commercial Facilities Program is to reduce pollutants in urban runoff discharges from industrial/commercial facilities to the MEP. The Permittees have not submitted any documentation to support the claim that the CAP has been successful, or to show that pollutants are being reduced to the MEP from facilities not covered by the CAP. The CAP inspection program began in 2002. The 2002-2003 Annual Progress Report provides the number of inspections conducted but no information regarding site compliance, follow-up/enforcement actions, or any other documentation to determine program effectiveness or success. As documented in the Riverside County MS4 Program Evaluation Report⁸², as of December 2002, the CAP was not being effectively implemented. CAP inspection forms were not being effectively distributed to or followed-up on by the responsible Permittees.

The statement that industrial/commercial facilities have not been identified as a source of water quality impairment in the Santa Margarita Watershed is misleading and not justified. The facility types specified in the tentative Order are either required by the federal regulations (40 CFR 122.26(d)(1)(i) and 40 CFR 122.26(d)(2)(iv)), or are known to contribute pollutants typically found in urban runoff, based on regional and national data⁸³. The Permittees' own DAMP⁸⁴ identifies heavy metals, pesticides/herbicides, oil and grease, phosphates, pH, and volatile organic carbon as priority pollutants potentially from industrial/commercial activities. The Permittees' local monitoring data⁸⁵ identifies various persistent exceedances of these and other pollutants associated with industrial and commercial activities, such as MBAS, chromium, nutrients, pH, diazinon, etc.

The Permittees have not demonstrated that pollutants from industrial/commercial facilities in the Santa Margarita Watershed have been reduced to the MEP.

116. Comment (District, January 28, 2004):

Permit Requirement H.2.b of the Tentative Order lists commercial and industrial facilities that must be inventoried and Requirement H.2.c.1 requires that these facilities be inspected. The Fact

⁸² SDRWQCB. Riverside County (Santa Margarita Watershed) MS4 Program Evaluation Report (Order No. 98-02, NPDES Permit No. CAS010766). December 11, 2002.

⁸³ 1) EPA. 1993. Results of the Nationwide Urban Runoff Program, Volume 1 – Final Report. 2) LARWQCB. 2001. The Role of Municipal Operators In Controlling the Discharge of Pollutants in Storm Water Runoff from Industrial/Commercial Facilities: A Case for Inspection Activities in the Large and Medium Municipal Separate Storm Sewer System Permits. 3) San Diego County Permittee water quality monitoring data.

⁸⁴ Permittees. Santa Margarita Regional Drainage Area Management Plan. March 1993. Section 2.

⁸⁵ Permittees. 2002-2003 Annual Progress Report. Volume 3. Section 10.

Sheet, pages 50 – 54 provides background for the requirements in H.2. Page 51 of the Fact Sheet states:

"The list of industrial and commercial facilities in Requirement H.2.b is either specifically addressed in the federal NPDES regulations referenced above, or have been determined by the Permittees, in their facilities lists developed pursuant to Order No. R9-98-02, the SDRWQCB (SDRWQCB, 2002a), or the EPA to contribute pollutants to the MS4."

This statement is incorrect as:

1. The Permittees had only committed to inspecting those facilities currently inspected under the CAP, as well as:
 - a. Mobile automobile and other vehicle washing (base of operations),
 - b. Mobile carpet, drape, or furniture cleaning (base of operations),
 - c. Mobile high pressure or steam cleaning (base of operations),
 - d. Nurseries and greenhouses,
 - e. Landscape and hardscape installation (base of operations), and
 - f. Other commercial sites/sources that the Permittee determines may contribute a significant pollutant load to the MS4.
2. The Federal Regulations do not specifically require the inspection of specific commercial facilities, or several of the industrial dischargers listed in Requirement H.2.b.
3. The California Water Code does not require the Permittees to inspect the commercial or several of the industrial facilities listed in Requirement H.2.B

For these reasons, the Permittees request that this section be revised to conform to Section 7 of the ROWD. The Permittees have committed to continue to implement the CAP and to expand our inspection program to include those facilities listed in item #1 above. The inclusion of additional facilities, including cemeteries, golf courses, and other commercial or industrial facilities not currently inspected by the CAP would not be acceptable to the Permittees without a cost/benefit analysis to support the expenditure and a direct link between those facility types and the current impairments in the watershed. There is no justification for expansion of the inspection program due to:

- 1) The lack of water quality impairments related to these facilities in the Santa Margarita Region
- 2) The lack of any identifiable link between deficiencies in the current commercial and industrial inspection program and water quality impairments
- 3) The success of the Permittee's current IC/ID program, which more cost effectively addresses discharges from these types of facilities.

Expansion of the CAP to include additional facilities and/or inspection responsibilities is effectively precluded due to staffing limitations. Due to the amount of training required and technical expertise developed in a range of environmental disciplines, inspectors are aggressively

recruited by other employers. As a result, Environmental Health has been unable to achieve full staffing of this group for several years, despite an ongoing recruitment and training program. Assignment of additional facilities for inspection or additional inspection responsibilities would impact the ability of the inspectors to meet their primary responsibilities related to hazardous materials or food services inspection. To address these concerns, the revised Tentative Order proposes to limit the inspection requirements to facilities either already addressed by the CAP, or facilities that the Permittees have identified as potential sources of pollutants (landscape operations, mobile operations, etc).

The Permittees also request that the referenced EPA document be cited.

Response:

There is no justification for changing Requirement H.2.b. The Permittees have not documented that pollutants from the additional facilities listed in Requirement H.2.b of the tentative Order have been reduced to the MEP or that there are no water quality concerns related to the facilities. As discussed above, the facility types specified in the tentative Order are either required by the federal regulations (40 CFR 122.26(d)(1)(i) and 40 CFR 122.26(d)(2)(iv)), or are known to contribute pollutants typically found in urban runoff, based on regional and national data⁸⁶. The Permittees' own DAMP identifies heavy metals, pesticides/herbicides, oil and grease, phosphates, pH, and volatile organic carbon as priority pollutants potentially from industrial/commercial activities. The DAMP (Table 2-2) lists golf courses, parks, schools, commercial developments as potential sources of priority pollutants. These facilities are potential contributors to the phosphorus impairment. Their own local monitoring data identifies various persistent exceedances of these and other pollutants associated with industrial and commercial activities, such as MBAS, chromium, nutrients, pH, diazinon, etc. Therefore, the list of industrial/commercial facilities remains the same, except for the removal of botanical or zoological gardens, which was removed because it is not currently applicable to the permitted area.

The expansion of the CAP was necessary to comply with the current permit issued by the EPA (Order No. R9-98-02), and the tentative Order does not require significantly more than what is currently expected. The current permit (Appendix 1, Part D) requires the Permittees to inventory, prioritize, and inspect all industrial facilities (as defined at 40 CFR 122.26(b)(14)) and all non-industrial facilities that may contribute pollutants to the MS4. In 2002⁸⁷, the SDRWQCB informed the Permittees that the facilities covered under the CAP may not be inclusive of all industrial/commercial facilities that generate pollutants and are required to be inventoried and inspected pursuant to Order No. 98-02. After the SDRWQCB issued a CWC Section 13267 request and a NOV, the Permittees submitted inventories of industrial/commercial facilities and the City of Temecula began inspecting the facilities that were not covered under the CAP⁸⁸. The

⁸⁶ 1) EPA. 1993. Results of the Nationwide Urban Runoff Program, Volume 1 – Final Report. 2) LARWQCB. 2001. The Role of Municipal Operators In Controlling the Discharge of Pollutants in Storm Water Runoff from Industrial/Commercial Facilities: A Case for Inspection Activities in the Large and Medium Municipal Separate Storm Sewer System Permits. 3) San Diego County Permittee water quality monitoring data.

⁸⁷ SDRWQCB. Annual Reporting for Order No. 98-02 and CWC Section 13267 Request. April 17, 2002.

⁸⁸ Permittees. 2002-2003 Annual Progress Report. September 15, 2003. Volume 2. Section 5.

tentative Order identifies facilities that are known to contribute pollutants in urban runoff⁸⁹, but the intent of the requirement is no different than that of the existing permit. The Permittees have already acknowledged the requirement to expand the CAP by developing inventories and inspection programs to address additional facilities that may contribute pollutant to the MS4.

EPA's comment letter, dated March 5, 2004, further justifies the list of facilities in the tentative Order. The letter states that the Regional Board has the authority to require inspections of all facilities listed in the tentative Order.

Finally, the tentative Order allows the Permittees to prioritize the industrial/commercial facilities as high, medium, or low threat to water quality. Therefore, if the Permittees have data or other information, such as an inspection report documenting no exposure of materials or activities, to show that a facility is a low threat to water quality, then it only needs to be inspected once during the 5-year permit term. This flexibility is built into the permit to allow permittees to prioritize inspections to target the greatest pollutant sources.

In response to the last sentence of the comment, the EPA document referred to is the current permit (Order No. 98-02) issued by the EPA, which requires the Permittees to inventory, prioritize, and inspect all industrial facilities (as defined at 40 CFR 122.26(b)(14)) and all non-industrial facilities that may contribute pollutants to the MS4. This section of the Fact Sheet has been revised to reference EPA's comment (EPA) in support of the list of industrial/commercial facilities in the tentative Order.

117. Comment – Requirement H.2.b - Source Identification (District, March 10, 2004):
Change Requirement H.2.b to:

“Each Permittee shall develop an inventory or database of all industrial and commercial facilities ~~under within~~ its jurisdiction (regardless of site ownership) that could contribute a significant pollutant load to the MS4. The inventory shall be based, at minimum, on those facilities currently inspected by Environmental Health as part of the Compliance Assistance Program. Additional facilities to be required or considered include: The following commercial facilities and activities shall be considered for inclusion to the extent that they are under the jurisdiction of the Permittees:” ~~At a minimum, the following facilities shall be included:~~

Response:

The first proposed change has been made to clarify that the Industrial/Commercial Facilities Program is limited to facilities under the jurisdiction of the Permittees.

The second proposed change has not been made. As discussed in Section H.2 of the Fact Sheet, the purpose of the Industrial/Commercial Facilities Program is to target facilities that potentially contribute pollutants to the MS4 and require the implementation of BMPs to reduce pollutants to the MEP. The Regional Board encourages the sharing of resources to help implement permit requirements, however, basing the inventory on a list of facilities inspected pursuant to other regulations, and not threat to water quality, does not meet the intent of the storm water

⁸⁹ Regional and national data (NURMP, LA County Source Study, San Diego Permittee data) indicate that these facility types contribute pollutants in urban runoff.

regulations. As documented in the record⁹⁰, facilities covered under the CAP do not represent all industrial facilities required to be inspected under the federal regulations, or all facilities that may contribute pollutants to the MS4 (see response to Comment No. 116).

118. Comment – Requirement H.2.b - Inventory (EMWD):

It is not clear whether a special district such as EMWD would be included as an industrial facility that the Permittees must inventory and inspect under the tentative Order. Under Article 6 of Government Code Section 53091, EMWD is not subject to local building ordinances of a county or city for the location or construction of facilities required for the production, generation, storage or transmission of water and waste water. EMWD requests clarification on whether or not a special district is regulated by the tentative Order.

Response:

The tentative Order does not require the Permittees to inspect facilities that they do not have jurisdiction over, such as EMWD. Section H.2.b. of the tentative Order has been revised to clarify that the Industrial/Commercial Facilities Program is limited to facilities under the jurisdiction of the Permittees.

119. Comment - Requirement H.2.b.1 – Commercial Facilities (District, March 10, 2004):

Where the commercial activities are mobile, the Permittees propose that the inventories identify the base of operation. By locating the base of operations of legitimate mobile operators, the Permittees can ensure that local mobile businesses are implementing BMPs to eliminate non-stormwater discharges to MS4s. Since most mobile operations are still illegitimate businesses, though, response to complaint calls through the IC/ID program will likely still be a large factor in addressing mobile operations.

Permittees propose:

- Automobile mechanical repair, maintenance, fueling, or cleaning;
- Airplane mechanical repair, maintenance, fueling, or cleaning;
- Boat mechanical repair, maintenance, fueling, or cleaning;
- Equipment repair, maintenance, fueling, or cleaning;
- Automobile and other vehicle body repair or painting;
- Mobile automobile or other vehicle washing (base of operations);
- Automobile (or other vehicle) parking lots and storage facilities;
- Retail or wholesale fueling;
- Pest control services (base of operations);
- Eating or drinking establishments;
- Mobile carpet, drape or furniture cleaning (base of operations);
- ~~Concrete~~ Concrete cement mixing or cutting (facility or base of operations);
- Masonry (base of operations);
- Painting and coating (facility or base of operations);

⁹⁰ SDRWQCB. Annual Reporting for Order No. 98-02 and CWC Section 13267 Request. April 17, 2002. Page 3 of Attachment 2.
SDRWQCB. NOV No. R9-2002-360. November 6, 2002. Alleged Violation No. 1.

- Botanical or zoological gardens and exhibits;
- Landscaping (base of operations);
- Nurseries and greenhouses;
- Golf courses, parks and other recreational areas/facilities;
- Cemeteries;
- Pool and fountain cleaning (base of operations);
- Port-a-Potty servicing (base of operations);

Response:

The proposed change has been made. Including the base of operations of mobile industrial/commercial activities in the inventory is logical because it may be the only available address and most practical way to contact operators. As stated in the comment, by locating the base of operations, Permittees can ensure that the operator is provided with educational material regarding required minimum BMPs and local ordinances. However, it is expected that, in addition to visiting the base of operations, Permittees will enforce their ordinances and ensure that appropriate BMPs are implemented when the mobile activities are observed in the field.

120. Comment - Requirement H.2.b.2 – Industrial Facilities (District, March 10, 2004):

Permittees propose to add the following text to Requirement H.2.b.2:

“At a minimum, the following industrial facilities shall be included to the extent they are under the jurisdiction of the Permittees:”

Response:

This additional text is not necessary. Requirement H.2.b clearly states that facilities under the Permittees’ jurisdiction are to be inventoried.

121. Comment – Requirement H.2.c.1 – BMP Implementation (District, January 28, 2004):

The Permittees request that Requirement H.2.c.1 be revised as follows:

“Each Permittee shall designate a set of minimum BMPs requirements for ALL industrial/commercial facilities to reduce the discharge of pollutants in runoff to the MEP.”

To:

“Each Permittee shall designate a set of minimum BMPs requirements for INVENTORIED industrial/commercial facilities to reduce the discharge of pollutants in runoff to the MEP.”

Response:

Requirement H.2.c.1 has been revised as requested. It is expected that all industrial/commercial facilities that may contribute a significant pollutant load to the MS4 will be inventoried, and that the inventory will be maintained as necessary to include new facilities.

122. Comment – Requirement H.2.c – BMP Implementation (District, January 28, 2004):

The Tentative Order requires the Permittees to establish and require Minimum BMPs for Industrial and Commercial Activities (Requirement H.2.c.1). Page 53 of the Fact Sheet indicates that the Permittees listed several controls for industrial and commercial development as part of the ROWD. These controls include:

Industrial Sites:

- Require proper chemical material storage – areas kept clean, materials protected from rain/runoff, no leakage.
- Ensure that dumpsters are properly maintained – lids closed, no signs of leaks, area clean.
- Ensure that aboveground tanks are properly maintained – no signs of leakage to MS4, ensure proper maintenance of tanks.
- Ensure onsite storm drain is protected from non-stormwater discharge.
- Ensure water/oil separator is connected to sewer, ensure steam cleaning wash water is discharged to storm drain.
- Ensure parking lot is free of trash and liquids other than water.
- Mop water taken to sanitary sewer via clarifier.
- Ensure coverage under the General Industrial Activities Stormwater Permit, if appropriate.

Commercial Sites:

- Ensure proper disposal of oil/grease (grease pumped/removed on regular basis, grease interceptor maintained properly).
- Ensure proper disposal of wash water from grease filters, floor mats, floor cleaning and grill cleaning.
- Ensure Outside areas are cleaned via dry methods such as sweeping, or that wash water is collected and conveyed to sewer.
- Ensure Dumpsters are properly maintained – trash bags sealed, dumpster lids closed, dumpsters dry and not washed to MS4.
- Ensure Employee Education Materials are displayed.

The Permittees understand that these controls meet the intent of the requirement for Minimum BMPs for industrial and commercial facilities. BMPs implemented by the business operator must be consistent with recommendations of the California Stormwater Quality Association (CASQA) Municipal Handbook and New Development Handbook, or equivalent, for these activities. It should be noted that several of the aforementioned BMPs target activities that specifically introduce nutrients, including phosphorous, into the MS4s. This is based on descriptions of the pollutant removal effectiveness of these BMPs in the CASQA handbooks. The Permittees therefore find these as adequate to address facilities that discharge into CWA Section 303(d) impaired water bodies impaired by nutrients, including Phosphorous (Murrieta Creek and Santa Margarita River are impaired for Phosphorous).

Response:

The proposed BMPs may be adequate minimum requirements for food facilities and for facilities that store hazardous waste. However, broadly applying these few BMPs to all types of inventoried industrial and commercial facilities may not be adequate or appropriate. For example, the proposed BMPs do not address vehicle maintenance and washing activities, mobile carpet cleaning, or building and grounds maintenance. Adequate minimum BMPs should address all facility types and activities that could potentially contribute pollutants to the MS4.

The CASQA Industrial and Commercial handbook contains fact sheets that describe pollution prevention, source control, and treatment control BMPs designed to reduce or treat pollutants from a wide variety of industrial and commercial activities. These fact sheets can be used to give facilities flexibility to decide which BMP works best to address their specific activities. The SDRWQCB does not require the use of CASQA BMP handbooks, but they provide a good example of the various facility types and activities that should be addressed with minimum BMPs. The SDRWQCB has provided the Permittees with various other examples that meet the permit requirement for minimum BMPs.

123. Comment – Requirement H.2.d - Industrial/Commercial Inspections (EPA):

A commenter argued that EPA regulations do not require inspections of specific commercial facilities or some of the industrial facilities listed in the permit. First, with regards to commercial facilities, EPA regulations at 40 CFR 122.26(d)(2)(iv)(A) provide for a broad program of "source control and structural measures to reduce pollutants from runoff from commercial and residential areas . . ." We believe that this regulation provides a firm basis for the permit's requirements related to commercial facilities. The requirements for outreach to commercial facilities, the inspections, and the follow-up enforcement would all be consistent with a program of "source control" measures to be included in a storm water management program.

For industrial inspections, EPA regulations at 40 CFR 122.26(d)(2)(iv)(C) require that permittees develop and implement controls for certain specified industrial sources and other industrial facilities which "the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system." A commenter appears to be arguing that the list of industrial facilities for which the permit requires inspection goes beyond the list in the EPA regulations.

The issue of industrial inspections also arose for the Los Angeles County MS4 permit. The State Board, in a memo dated November 9, 2001, from Michael Lauffer of the State Board to Dennis Dickerson, Executive Officer of the Los Angeles Regional Board, noted that under Section 402(p)(3)(B)(iii) of the CWA, the Board has broad authority to require "such other provisions . . . as the State determines appropriate . . .", and that this would provide a basis for requirements that go beyond the specific provisions of the EPA regulations. We would agree with the State Board on this matter, and that the Regional Board would have the authority to require inspections of all the industrial facilities listed in the permit, despite the specific provisions of the EPA regulations.

Response:

Comment noted.

124. Comment – Requirement H.2.d.3.c. Industrial Inspections (District, March 10, 2004):

Consistent with the direction of the Regional Board to eliminate duplicative requirements at the February 11 hearing, the revised Tentative Order also deletes the requirement to review of monitoring data collected by industrial facilities per requirements of the General Industrial Activities Stormwater Permit. The Permittees believe that the intent of this requirement can be met by having the Regional Board staff coordinate with the Permittees when the Regional Board staff's review of monitoring data indicates a potential violation of Permittee ordinances.

Permittees propose to change Requirement H.2.d.3.c to:

“Assessment of BMP effectiveness, ~~including a review of any available monitoring data conducted pursuant to the General Industrial Permit;~~”

Response:

Requirement H.2.d.3.c has been revised as requested. However, the SDRWQCB encourages Permittees to review available monitoring data at industrial facilities and may consider including this requirement in future MS4 permits. According to the USEPA, municipalities should develop programs to help NPDES authorized states, including reviewing and evaluating storm water pollution prevention plans and other procedures that industrial facilities must develop under the general industrial Permit (EPA Part 2 Guidance p 6-17). The data can also be a useful tool to help assess BMP effectiveness and compliance with local ordinances.

125. Comment – Requirement H.2.d.3.c. Industrial Inspections (Verbal – Jason Uhley, District):

The training requirement to train inspectors to review data collected for the General Industrial Permit would be extensive. This monitoring data is not easy to analyze.

Response:

The Permittee has not provided documentation to support the statement that the training requirement would be extensive. General Industrial Permit monitoring consists of analyzing two storm water samples per year for total suspended solids, pH, specific conductance, and oil and grease.⁹¹ Reviewing data involves comparing these five results to EPA Benchmark Values⁹². According to the SWRCB Industrial Permit Database⁹³, there are approximately 25 facilities covered under the General Industrial Permit in the Upper Santa Margarita Watershed. Based on these facts, training inspectors to review Industrial General Permit data should not be an extensive endeavor. Regardless, the requirement has been revised to give Permittees greater flexibility in developing inspection procedures.

126. Comment - Requirement H.2.d.4.a – Commercial Inspections (District, March 10, 2004):

Change Requirement H.2.d.4.a. to:

⁹¹ SWRCB. Waste Discharge Requirements for Discharges of Storm Water Associated With Industrial Activities Excluding Construction Activities (Water Quality Order No. 97-03-DWQ, NPDES General Permit No. CAS000001).

⁹² Federal Register. Vol. 65, No. 210, page 64767. October 30, 2000.

⁹³ The Industrial Permit Database is located at http://www.swrcb.ca.gov/stormwtr/databases.html#indus_db

“Assessment of compliance with Permittee local storm water ordinances and permits, including the implementation and maintenance of designated minimum BMPs;”

Response:

To clarify that Permittees are only obligated to enforce their urban runoff-related ordinances, Requirement H.2.d.4.a. has been changed to:

“Assessment of compliance with Permittee ordinances and permits related to urban runoff, including the implementation and maintenance of designated minimum BMPs”.

Section H.3 – Residential Program

127. Comment - Requirement H.3.a. – Pollution Prevention (District, March 10, 2004):
Change requirement to:

“Each Permittee shall, through public education, encourage the use of pollution prevention methods by residents, where appropriate.”

Response:

This change has not been made. As written, the requirement allows Permittees flexibility to determine how they will encourage the use of pollution prevention methods. A Permittee may choose to do this through public education, and state this in its Individual SWMP. The addition as proposed would restrict the flexibility of this requirement and is not appropriate.

128. Comment (SWRCB):

On Page 27 under the Residential Program of the Existing Development section, one of the categories of Source Identification is Automotive Parking. Why is this listed here and what minimum BMPs are imagined for this activity?

Response:

Automotive parking is listed here because it is an activity known to contribute pollutants to MS4s and receiving waters. According to an article from Watershed Protection Techniques, hydrocarbon hotspots are often linked to vehicle parking for long periods of time, as well as brief periods. Another Watershed Protection Techniques article states that cars are the leading source of metal loads in California (Article 6, WPT 1(1):28). The Permittees subject to the Orange County MS4 Permit proposed the following BMPs to satisfy this requirement:

- Residents will be required to remove vehicles from the street during designated street/sweeping/cleaning times.
- Residents are encouraged to place a pan or similar collection device under their automobile if it is leaking fluids, until such time as the leak may be repaired.
- Use dry cleaning methods to remove any materials deposited by vehicles (e.g. adsorbents for fluid leaks, sweeping for soil clod deposits).
- Residents are encouraged to perform routine maintenance on their automobiles to minimize fluid leaks, and maximize efficiency.

129. Comment – BMP Requirements (District, January 28, 2004):

The intent of the minimum residential area BMP requirement must be clarified. Regional Board staff has stated that the objective of Requirement H.3.c is to establish initial controls on the high priority residential activities listed in Requirement H.3.b. Regional Board staff indicated that controls for these activities are to be based on existing Ordinances. The Permittees will propose BMPs for the listed high priority residential activities based on existing ordinances where appropriate. The Permittees understand that the minimum BMPs for residential areas may include:

- Automobile Repair and Maintenance – Use 72-hour parking limit to control disabled and leaking cars parked in streets
- Automobile Washing – Prohibit discharge of engine degreaser residue into the MS4
- Automobile Parking – Enforce parking prohibitions on areas subject to street sweeping
- Home and Garden Care activities and product use – Prohibit the disposal of excess pesticides, herbicides, and fertilizer containers or products into the MS4
- Disposal of Household Hazardous Wastes – Provide HHW/ABOP Pick-up locations and events within the watershed, prohibit discharge of HHW into MS4.
- Disposal of Pet Waste – Prohibit discharge of Pet Waste to MS4
- Disposal of Green Waste – Prohibit discharge of Green Waste to MS4

With Regard to Requirement H.3.c.2, the Permittees find that the control of fertilizers, pet waste and green waste should adequately address activities that discharge into CWA section 303(d) impaired water bodies impaired by nutrients, including phosphorous (Murrieta Creek and Santa Margarita River are impaired for phosphorous).

The Permittees will comply with Requirement H.3.c.4 by developing and distributing public education materials to residents at community events, and the Permittees may also place radio or print advertisements in local media.

Response:

It is true that many acceptable BMP requirements for residential activities can be derived from existing ordinances. For example, many municipalities have existing ordinances governing the disposal of pet waste. The original intent of this ordinance may have been for aesthetic purposes and not necessarily for the protection of water quality, but requiring proper disposal of pet waste helps protect water quality and is an appropriate minimum BMP. A Permittee may have sufficient existing ordinances to address all high priority residential activities. Some, however, may not. Permittees should not rely solely on existing ordinances if they are not sufficient to reduce pollutants to the MEP, but should consider the need to enhance public educational efforts and, if necessary, require additional residential BMPs pursuant to their local storm water ordinances. The Orange County permittees have developed minimum BMPs requirements for the residential activities listed in the tentative Order. The Permittees could choose which of these BMPs are appropriate for the Santa Margarita Watershed and require their implementation. In response to the comment, Requirement H.3.b has been modified to provide the Permittees with the flexibility to identify which high priority residential activities are appropriate for BMP development, implementation, and enforcement.

130. Comment - Requirement H.3.c.1 – BMP Implementation (District, March 10, 2004):

Change Requirement H.3.c.1 to:

“Within 356 days from the date of this Order, each Permittee shall designate a set of minimum BMPs ~~requirements~~ for all high priority residential activities to reduce the discharge of pollutants in urban runoff to the MEP. Through the public education program, the Permittees shall encourage the implementation of these BMPs.”

Response:

The proposed changes have not been made. Public education efforts may be the primary tool but certainly not the only tool that Permittees should use to reduce the discharge of pollutants from residential sources to the MEP. The public education program is an appropriate mechanism to educate residents about water quality concerns and BMPs. The Permittees, however, must also ensure that, where necessary, BMPs are implemented to reduce pollutants to the MEP.

131. Comment - Requirement H.3.c.2 – BMP Implementation (District, March 10, 2004):

Change Requirement H.3.c.2 to:

“For residential activities tributary to CWA section 303(d) impaired water bodies that generate pollutants for which the waterbody is impaired, each Permittee shall designate additional BMPs to target that pollutant. Each Permittee shall provide public education to encourage the implement, or require implementation of these, additional BMPs controls for high priority residential activities within or directly adjacent to or discharging directly to receiving waters within ESAs as necessary to comply with this Order.”

Response:

These changes have not been made for the reasons cited in response to Comment No. 130.

132. Comment - Requirement H.3.c.3 – BMP Implementation (District, March 10, 2004):

Change Requirement H.3.c.3 to:

“Each Permittee shall provide public education to encourage implement or require implementation of the designated minimum BMPs for the high priority residential activities listed in Requirement H.3.b. above. If a particular minimum BMP is infeasible for any specific site/source, each Permittee shall provide public education to encourage require implementation of other equivalent BMPs. Each Permittee shall also provide public education to encourage implement, or require implementation of, any additional BMPs necessary to comply with this Order.”

Response:

These changes have not been made for the reasons cited in response to Comment No. 130.

133. Comment - Requirement H.3.c.4 – BMP Implementation (District, March 10, 2004):

Change Requirement H.3.c.4 to:

“Within 365 days from the date of this Order, each Permittee shall provide public education to notify residents of the applicable minimum BMPs requirements, and a description of the local codes or ordinances requiring compliance with recommended to reduce reducing the discharge of pollutants in runoff to the MEP.”

Response:

These changes have not been made. Public education is an appropriate means to notify residents of the required and recommended BMPs. .

**134. Comment - Requirement H.3.d – Enforcement in Residential Areas and Activities
(District, March 10, 2004):**

Delete Requirement H.3.d.

Response:

The request to delete Requirement H.3.d has not been made. In response to Requirement H.3.d, each Permittee must include, in its enforcement program, residential activities that violate its storm water ordinances. The SDRWQCB expects the Permittees to use education and verbal notification as the primary enforcement mechanisms to enforce violations of its local ordinances in residential areas. However, the SDRWQCB expects that each Permittees will prioritize its “enforcement” workload and pursue the “worse of the worse” cases that may require incremental enforcement above verbal warnings. Most of these worst cases sites will likely involve some type of illicit discharge.

Section J – Illicit Discharge Detection and Elimination Program

135. Comment – Requirement J.1 (District, March 10, 2004):

Change Requirement J.1 to:

“Each Permittee shall implement a program to actively seek and eliminate non-allowed flows and illicit discharges and connections into its MS4. The program shall address all types of illicit discharges and connections excluding those non-storm water discharges not prohibited by the Permittee in accordance with Section B of this Order.”

Response:

The proposed change has not been made because the tentative Order defines the term “illicit discharge”, which would be consistent with a definition of “non-allowed flows”.

136. Comment – Requirement J.3 (District, March 10, 2004):

Change Requirement J.3 to:

“Each Permittee shall select and inspect reconnaissance stations within its jurisdiction, conduct dry weather inspections, field screening, visual observation, and analytical monitoring shall be conducted in accordance with the Monitoring and Reporting Program of the MS4 within its jurisdiction to detect illicit discharges and connections in accordance with the Monitoring and Reporting Program.”

Response:

Requirement J.3 has been simplified to refer to the Illicit Discharge Monitoring Program described to Section II.B of the tentative MRP. This clarifies that all monitoring associated with the Illicit Discharge Detection and Elimination Program is contained in the MRP. The requirement has been modified as follows:

Each Permittee shall conduct Illicit Discharge Monitoring in accordance with Section II.B of the Monitoring and Reporting Program (MRP) to detect illicit discharges and connections.

137. Comment – Requirement J.4 (District, March 10, 2004):

Change Requirement J.4 to:

“Each Permittee shall investigate and inspect any portion of the MS4 that, based on visual observations, monitoring results or other appropriate information, indicates a reasonable potential for illicit discharges, illicit connections, or other sources of non-storm water (including non-prohibited discharge(s) identified in Section B of this Order). Each Permittee shall develop numeric criteria in accordance with Section II.A.5.3) ~~establish follow-up procedures and develop numeric criteria in accordance with section II.B.2.d.~~ of the Monitoring and Reporting Program to determine when follow-up actions will ~~be necessary~~~~occur~~. Numeric criteria and follow-up procedures shall be described in each Permittees’ Individual SWMP.”

Response:

Requirement J.4 has been changed as requested.

138. Comment – Requirement J.7 (District, March 10, 2004):

Insert “sewage” into the second and ninth bullets. Also, because the Permittees do not own, operate or maintain sanitary sewers, several of the actions listed are not applicable. However, County Health and Hazmat responds to and informs the Permittees of sewage spills of any sort.

Response:

The word “sewage” has been inserted into the second and ninth bullets as requested. The requirement states that the Permittees shall take “appropriate” actions, which “may” include the bulleted list. Therefore, if an action is not applicable to a Permittee, the Permittees are not expected to implement the action.

Section K – Watershed-Based Activities

139. Comment – Requirement K.2.b (District, March 10, 2004):

This requirement should not be necessary as the Regional Board has the authority to regulate these sources as Phase I and II MS4 permittees – why pass this responsibility off on the Permittees?

Response:

The SDRWQCB is not passing its responsibility to regulate Phase I and Phase II dischargers to the Permittees. The purpose of the requirement is for the Permittees to identify any agreements that they have with other MS4 owners to coordinate program efforts. For example, coordinating educational efforts, schedules for cleaning MS4s, spill notification and response, etc.

140. Comment – Requirement K.2.f (District, March 10, 2004):

Change to:

A watershed-based education program, which focuses on water quality issues specific to the upper Santa Margarita watershed.

Response:

Change has not been made. Activities in the upper watershed can result in water quality issues downstream, as well as in the upper portion of the watershed. An adequate education program must include education about the value of the aquatic habitat and resources of and water quality issues related to the lower Santa Margarita Watershed and coastal waters and the potential impacts to those resources from urban runoff.

Attachment C – Definitions

141. Comment (District, March 10, 2004):

To promote clarity of intent, please define terms used in the tentative Order in a glossary, capitalize defined terms within the text and use them consistently. The Permittees request that terms used in the tentative Order be defined consistent with established federal and state regulatory definitions.

Response:

Comment noted. All terms that are not considered common knowledge are defined in Attachment C. Capitalization of words within the Order that are defined in the glossary is not necessary. Definitions are consistent those defined in the Code of Federal Regulations.

142. Comment - Construction Site (District, January 28, 2004):

The definition of construction site is overly broad and would include small projects like water heater installation.

Response:

The definition of construction site was included in the tentative Order to include all sites that had the potential to generate pollutants. The proposed definition, however, could include insignificant sites and those not exposed to storm water (interior remodeling). In response to the comment, and to provide additional clarification, the definition has been changed in the tentative Order to:

“Any project requiring a local grading or building permit, including projects requiring coverage under the General Construction Permit, that involves soil disturbing activities. Soil disturbing activities include clearing, grading, disturbances to ground such as stockpiling, and excavation.”

143. Comment – Environmentally Sensitive Areas (ESAs) (District, March 10, 2004):

The definition of ESA should be revised per the Public Resources Code, section 30107.5, without modification. The Permittees are particularly concerned with the reference to the Western Riverside County Multi-Species Habitat Conservation Plan (MSHCP) in the permit text, glossary and Fact Sheet. The MSHCP identifies broad areas from which preserves and species movement corridors should be constructed. For each quarter section (approximately ¼ square mile) identified in the plan, a specified percentage of that area must be conserved to meet plan objectives. Not all lands identified in the MSHCP planning documents will therefore be

preserved, or were intended to be preserved. This could be confusing to constituents, Permittees, and regulators attempting to interpret the tentative Order.

Response:

The definition of ESA contained in the tentative Order is consistent with the Public Resources Code section 30107.5 as well as with other MS4 permits issued by the SDRWQCB. The second sentence of the definition serves to clarify types of areas and designations that are inherently sensitive and require additional controls to mitigate the impacts from urban runoff. The MSHCP addresses habitat needs of endangered species, and the preservation of native vegetation in Western Riverside County.⁹⁴ Because the MSHCP Conservation Area includes areas in which plant or animal life or their habitats are either rare or especially valuable, it is appropriate and important to reference the MSHCP in the ESA definition. The SDRWQCB understands that the entire MSHCP plan area will not be preserved. The inclusion of the MSHCP does not mean that the entire MSHCP area must be preserved, it is intended to ensure that portions of the MSHCP that contain rare or especially valuable plant or animal life or their habitats are addressed with the requirements for ESAs in the tentative Order. To clarify the intent, the second sentence of the ESA definition has been modified as follows:

“ESAs subject to urban runoff requirements include but are not limited to all CWA section 303(d) impaired water bodies; areas designated as Areas of Special Biological Significance by the SWRCB (Basin Plan); water bodies designated with the RARE beneficial use by the SWRCB (Basin Plan); areas within the MSHCP plan area that contain rare or especially valuable plant or animal life or their habitat; and any other equivalent environmentally sensitive area which the Permittees have identified.”

144. Comment – Receiving Waters (District, March 10, 2004):

The Permittees recommend the following definition based on the Santa Ana MS4 permit: “Receiving Waters – The Waters of the U.S. that includes surface and ground waters.”

Response:

For simplification and clarification, the definition of “receiving waters” has been changed to mean “waters of the U.S.” The definition of “waters of the U.S.” has been slightly modified to be consistent with the federal definition.

145. Comment – Urban Runoff (District, January 28, 2004):

The definition of Urban Runoff in the proposed Permit broadly includes all flows in the MS4, including stormwater and non-stormwater, whether of Urban origin or within the jurisdiction of the Permittees. However, the term is consistently used in the Tentative Order to refer prescriptively to runoff from existing developments (h.l.c.l, h.3.c.1) and new developments (F.2.b.7, F.2.b.8). The Tentative Order also uses the term to broadly cover discharges from urbanized areas under the Permittees' jurisdictions. Examples include Watershed SWMP (K.m), Education (1) and occasional references in the Receiving Waters Monitoring Program (Purpose, core monitoring, triad approach, other locations).

⁹⁴ County of Riverside. June 17, 2003. Final MSHCP. MSHCP Definitions.

Based on this usage, the definition is overly broad. Replacement of the Urban Runoff definition with the following definition based on the Santa Ana Region MS4 Permit is recommended. This language has been reviewed and approved by State Water Resources Control Board counsel during the approval of Board Order R8-2002-0011.

"Urban Runoff includes those storm water and non-storm water discharges from residential, commercial, industrial, and other urban and non-urban land uses and construction areas within the Permit Area that the Permittees have legal authority to regulate. Urban runoff excludes flows from agricultural activities (including feedlots, dairies and farms), open space, state and federal properties and other urban and non-urban land uses not under the legal authority of the Permittees. MS4 discharges often consist of a mix of Urban Runoff and other storm water and non-storm water flows from sources outside the Permittees control."

The current definition could raise problems. For example, the definition of urban runoff implies that the Receiving Waters Monitoring Program is not designed to specifically address discharges from Urbanized Areas, and that it is in fact, specifically designed to monitor discharges from other sources, including agriculture, Federal and State lands. Although this argument is raised further, and based on other reasons in the Monitoring Program paper, this alone could require that the Monitoring and Reporting Program be interpreted as an unfunded mandate that requires reimbursement as defined in the "unfunded mandate" position paper. Alternatively, the Regional Board should, and the Permittees request, require these other dischargers, and others in the watershed including Caltrans, Phase 11 dischargers, Tribal Lands, utilities and special districts to participate equally in funding the mandated receiving water monitoring programs.

Response:

No change has been made to the definition of "urban runoff". The MS4 permit regulates the discharge of pollutants into and from the Permittees MS4s.⁹⁵ Both storm water runoff and permitted non-storm water runoff convey pollutants in the MS4. To address these pollutants, the Permit requires the implementation of regulatory and non-regulatory measures for those program components identified in the Federal storm water regulations. We understand that the Permittees' options for controlling pollutants at the source is limited in situations where the source is outside its regulatory and legal jurisdiction. However, it is difficult to understand the Permittees' position that they have no responsibility for discharges of pollutants from their MS4 if the discharge originates from outside their jurisdiction or from a non-urbanized area. For example, it would be irresponsible, and perhaps criminal, of the Permittees if they did nothing to protect their residents from extremely hazardous chemicals discharged from their MS4 that occurred as a result of an accident on land outside the Permittees' control.

Comments on the Fact Sheet/Technical Report

146. Comment (Richards/Watson/Gershon, February 10, 2004):

Nowhere in the Regional Board's tentative Fact Sheet has any effort been made to identify the particular portions on which the Regional Board is relying. Accordingly, until such time as the

⁹⁵ See Findings 4-7 and Prohibition A.3

Regional Board identifies the specific portions of the documents upon which it is relying, they should not be included as part of the administrative record.

Response:

The majority of the documents listed in Section X of the tentative Fact Sheet (References) are included as a whole, because the SDRWQCB is relying on the entire document, and it would not be possible to specify particular portions. For example, all information and conclusions included in the LARWQCB's technical report on RGOs are applicable to the requirements involving RGOs. For broader documents, such as EPA's Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems, specific portions are not identified in the Reference section of the Fact Sheet because the document supports many different requirements and it is not necessary to specify each applicable portion. Where the Guidance Manual is referenced within different sections of the Fact Sheet, the applicable portion can be located via the table of contents in the Guidance Manual. In response to this comment, specific portions will be added to references in Section X of the Fact Sheet, where necessary and appropriate.

147. Comment (Verbal – Alex Gann, County of Riverside):

The Fact Sheet does not identify any water quality benefits that would be significantly improved by the tentative Order.

Response:

Expected benefits of implementing the provision of the tentative Order include:

- **Enhanced aesthetic value:** Urban runoff affects the appearance and quality of a water body, and the desirability of working, living, traveling, or owning property near that water body. Reducing urban runoff pollution will increase benefits as these water bodies recover and become more desirable.
- **Drinking water benefits:** Urban runoff discharges have been identified as one of the most prevalent possible contaminating activities for drinking water. Pollutants from urban runoff, such as solids, toxic pollutants, and bacteria may pose additional costs for treatment, or render water unusable for drinking.
- **Ground water replenishment:** Urban runoff can be a significant resource that can be used to recharge ground water basins in the area and reduce the dependence on imported water.
- **Enhanced opportunities for non-contact recreation:** Urban runoff controls reduce turbidity, odors, floating trash, and other pollutants, which enhances the experience of hiking, rafting, fishing and other recreational activities.
- **Enhanced fishing:** Pollutants in urban runoff can eliminate or decrease the numbers, or size, of fish in receiving waters.

148. Comment (Verbal – David Hogan, City of Temecula):

The Fact Sheet lacked any detailed facts or any information that might enable a decision maker to say we actually have a water quality problem here that's related to urban runoff, and these are the beneficial uses that are going to be protected. I didn't see any of that anywhere. When I asked where it was, I was told by staff, well, we don't need any data, we can just do the permit.

Response:

Section VI of the Fact Sheet describes the beneficial uses of water bodies in the Upper Santa Margarita Watershed and potential impacts from urban runoff. Because data from the Permittees' monitoring program has been inadequate to make scientifically defensible conclusions about specific impacts of urban runoff in the upper Santa Margarita Watershed, staff referenced impacts of urban runoff that are widely documented throughout the nation, state, and region. In support of the SDRWQCB, EPA commented that, "the fact sheet and findings for the permit adequately document existing water quality concerns in the watershed (and potential future concerns due to the rapid growth of the area) and [we believe] that the permit requirements are appropriate for this area." Further information about water quality concerns specific to the Santa Margarita Watershed are discussed in response to Comment Nos. 34 and 35.

149. Comment - Section V.C Description of Permitted Area (Finding No. 3) - 2nd paragraph (District, March 10, 2004):

The Permittees recommend that Section C be revised to incorporate the following additional facts:

Temecula Creek (30 miles, 366 sq. mi. watershed) and Murrieta Creek (12⁹⁶ miles, 222 sq. mi. watershed), join to form the Santa Margarita River, near the city of Temecula. The Santa Margarita River flows for 1.8 miles within Riverside County, then another 35.2 miles through San Diego County before ending at the Santa Margarita Lagoon.

The climate in the upper Santa Margarita watershed is characterized as semi-arid with an average annual precipitation of 12-16 inches in the urbanized areas. Murrieta and Temecula Creeks are perennial interrupted streams, i.e., they include reaches in which the flow is continuous and others where flow is ephemeral. The areas of perennial flow are located in mountain area tributaries. The perennial flows infiltrate within a short distance of reaching Murrieta or Temecula Creeks. Groundwater surfaces approximately one-quarter to one-half mile upstream of the confluence of Murrieta and Temecula Creeks where the bedrock is much closer to the surface. The creeks in the urbanized areas of the watershed, located primarily in the valley, are ephemeral and flows are observed only during and immediately after significant storm events.

The rising groundwater which constitutes the flow in the Santa Margarita River is currently augmented by imported water deliveries by Rancho California Water District downstream of the confluence. In the past, a 2 MGD live-stream discharge of treated effluent was discharged to Murrieta Creek. During dry weather, runoff from urban development is minor, rapidly infiltrates and does not contribute to downstream pollutant loading. The only flows that reach the lagoon from the upper Santa Margarita Watershed would be from rising groundwater and the imported water deliveries.

Urban development comprises only six percent of the total area of the upper Santa Margarita River watershed. During wet weather, only a small portion of the flows within the Santa Margarita River would be generated from urban areas. Flows reaching the lagoon would be

⁹⁶ The lengths for Murrieta Creek and the Santa Margarita River are incorrect in the draft permit fact sheet. The lengths noted come from the 2002 303(d) list.

comprised primarily of runoff from agricultural land and lands not under Permittee jurisdiction, such as from San Diego County, tribal, federal, state, and other special district properties, in addition to those of urban land uses.

Murrieta Creek and the Santa Margarita River are listed as impaired for phosphorus based on evidence of persistent exceedence of the Basin Plan Objective of 0.1 mg/L for Phosphorous. The objective for phosphorus is based on a study of the levels of phosphorus needed to restore the Florida Everglades, a marsh with severe eutrophication. There is neither a primary (health-based) nor secondary (aesthetic) drinking water maximum contaminant level for phosphorus.

Within the Santa Margarita watershed, only the Santa Margarita Lagoon in the lower watershed has been determined to be impaired by eutrophication. In the upper watershed, there are many land uses other than urban, including agricultural, tribal, other special districts, state, and federal. There is a long history of agricultural land uses in the upper watershed, and the presence of nutrients such as phosphorus is still evident in the rising ground water. The only waterbody listed as high priority for nutrients is Rainbow Creek in the lower watershed. A TMDL is in the process of being developed by the Regional Board for Rainbow Creek. According to the Water Body Fact Sheet⁹⁷ to support the listing for Rainbow Creek, its designation as "eutrophic" was changed to impaired for "nitrate" and "phosphorus" because "[t]he original designation was based upon a faulty assumption that eutrophic conditions existed because of the elevated levels of nutrients. Data collected for development of the TMDL has revealed that eutrophic conditions do not exist, but concentrations of nitrate and phosphorus in excess of Basin Plan objectives do exist." Attachment A includes information related to phosphorus concentrations in the Santa Margarita Watershed. The graphs show phosphorus concentrations from Rancho California Water District's live stream discharge to Murrieta Creek, their discharge of raw potable water from the System River Meter to Murrieta Creek, and receiving water data for Murrieta, Temecula, and Rainbow Creeks, and the Santa Margarita River analyzed by the District, RCWD, EMWD, Camp Pendleton, and the Regional Board. Several items stand out in reviewing the graph:

- Phosphorus levels in the potable water discharge to the Santa Margarita River occasionally exceed the BPO
- Phosphorus levels tended to be lower in the receiving water station than in the live stream discharge, indicating that Murrieta Creek assimilated the phosphorus.
- Phosphorus levels in Temecula Creek tend to be higher than in the Santa Margarita River, indicating that the River is assimilating or diluting the phosphorus from Murrieta and Temecula Creeks.
- Phosphorus levels in general vary between 0 and 1 mg/L in the upper Santa Margarita River watershed, and down the Santa Margarita River to the De Luz crossing. Levels are consistently much higher at the Estuary.

Response:

The requested addition to Section V.C of the Fact Sheet has not been included. The purpose of Section V.C is to briefly describe the permitted area. The second paragraph states that further

⁹⁷ 2002 CWA Section 303(d) List of Water Quality Limited Segments, Volume III: Regions 5-9, pgs. 9-79 to 9-80.

information about watershed characteristics can be found in the Permittees' ROWD. It is not necessary for the purpose of the Fact Sheet to recite extensive information regarding the watershed.

Regarding the lengths of Murrieta Creek and the Santa Margarita River, the lengths noted in the Fact Sheet represent the impaired length, not necessarily the entire length of the water body. For Murrieta Creek, the entire length of 12 miles is impaired for phosphorus. This length has been corrected in the Fact Sheet. For the Santa Margarita River, the upper 17.5 miles are impaired for phosphorus, so this length listed in the Fact Sheet is correct.

150. Comment - Section VLB Pollutants of Concern in the Upper Santa Margarita Watershed (District, March 10, 2004):

The referenced quote is from Coordination Act Report (CAR), July 2000, prepared by United States Fish and Wildlife Services (USFWS) for the Murrieta Creek Project. The CAR is intended to partially assess the biological conditions in the study area and partially assess the potential impacts of fish and wildlife resources from implementing the USACOE recommended plan. The referenced quote was made by the United States Fish and Wildlife Service as part of a biological opinion in opposition of the proposed project. There are many inaccurate statements made within the CAR. In addition, the USACOE's Environmental Impact Report (EIR) conclusion, with regards to the project's impacts, do not support the statement made above. The EIR goes further to identify water quality benefits from the proposed project. Despite the comments made within the CAR, the USACOE approved the project.

Response:

Regardless of the intent of the CAR, the referenced quote describes impacts that have occurred as a result of rapid development and urbanization in the Murrieta Creek watershed and is appropriate to include in Section VLB of the Fact Sheet. The CAR references the Integrated Management Plan for Murrieta Creek (Cal Poly 1996). The Permittees have not provided documentation that the referenced quote is inaccurate. No change, therefore, has been made in response to this comment.

151. Comment - Section VLB, Table 1 (District, March 10, 2004):

On Table 1 on Page 12 of the Fact Sheet, Temecula Creek should not be included as it has no listed impairments on either the 303(d) or the Monitoring Lists. The length of the Santa Margarita River is 1.8 miles within Riverside County.

Murrieta Creek and the Upper Santa Margarita River are listed on the 2002 303(d) List of Water Quality Limited Segments as impaired for Phosphorus. The length of the Santa Margarita River is 1.75 miles within Riverside County. Murrieta Creek is also on the 2002 Monitoring List for iron, manganese, and total dissolved solids, and the Santa Margarita River is listed for iron, manganese, sedimentation/siltation, sulfates, and total dissolved solids.

What is the importance of phosphorus exceedences? Phosphorus is an essential nutrient for plant and animal growth. There is no primary (human health) or secondary (aesthetic) maximum contaminant level (MCL) established for phosphorus, nor is it listed on EPA's Unregulated Contaminant Monitoring Rule or California Toxics Rule lists. EPA's "Quality Criteria for Water,

1986", commonly referred to as the "Gold Book", recommends a standard of 0.1 mg/L total phosphorus for preventing plant nuisances in flowing waters that do not directly discharge to lakes and to control accelerated eutrophication. Neither Murrieta Creek nor the upper SMR within Riverside County have a problem with plant nuisances, and since, during dry weather, there is no flowing water except at the lowest part of the watershed, there is also no accelerated eutrophication. The lower part of the watershed is fed by springs and rising groundwater and is also not exhibiting any signs of accelerated eutrophication. As shown in Fact Sheet Comment No. 1 (pg. 2), phosphorus is being assimilated by Murrieta Creek and the SMR.

What is the importance of the "Monitoring List" parameter exceedences? There are no primary drinking water MCLs for any of these parameters, so there is not a human health issue. None of these parameters are on either the EPA's Unregulated Contaminant Monitoring Rule or California Toxics Rule lists. Iron, manganese, sulfate, and total dissolved solids have a secondary (aesthetic) drinking water MCL. In addition to industrial use, iron, sulfate, and TDS can be contributed by soils, and the soils in the watershed are highly erosive.

According to the Water Body Fact Sheets for Murrieta Creek⁹⁸ and the Santa Margarita River⁹⁹, the following rationale was given for placing parameters on the Monitoring List:

⁹⁸ 2002 CWA Section 303(d) List of Water Quality Limited Segments, Volume III: Regions 5 – 9, Water Bodies Proposed for the Monitoring List in Region 9, pg. Region 9 Monitoring List-6.

⁹⁹ 2002 CWA Section 303(d) List of Water Quality Limited Segments, Volume III: Regions 5 – 9, Water Bodies Proposed for the Monitoring List in Region 9, pgs. Region 9 Monitoring List-11-13.

| Water Body | Pollutant/Stressor | Rationale |
|--|-------------------------|---|
| Murrieta Creek | Iron | Quarterly sampling by Camp Pendleton from 1997 to 2000 and one-time sampling by RWQCB staff in 1998, indicated possible exceedance of the Basin Plan Objective). Additional monitoring is required to confirm this possibility. |
| | Manganese | |
| | Total Dissolved Solids | |
| Santa Margarita River (entire and tributaries) | Sedimentation/Siltation | RWQCB staff believes that a significant water quality problem exists because of prior experience with, and personal observations in, the watershed/water body, but no data was readily available to support a Section 303(d) listing. |
| Santa Margarita River (upper) | Iron | Quarterly sampling by Camp Pendleton from 1997 to 2000 indicated possible exceedance of the Basin Plan Objective or the California Code of Regulations Secondary MCL. Additional monitoring is necessary to confirm this possibility. After reviewing available information from the RWQCB, SWRCB staff concludes that the water body should be placed on the Monitoring Priority List because the data are inadequate to determine if applicable water quality standards are exceeded. This conclusion is based on the staff findings that: 1. The data is considered to be of inadequate quality. 2. The data exhibited insufficient spatial and temporal coverage. 3. Non-standard methods were used. An inadequate amount of the water quality measurements exceeded the water quality standard. The staff confidence that standards were exceeded is low. |
| | Manganese | |
| | Sulfate | |
| | Total Dissolved Solids | |

Response:

There has been no change to Table 1 in Section VI.B of the Fact Sheet in response to this comment.

Regarding the first paragraph of this comment, it is appropriate to include Temecula Creek in Table 1 on page 12 of the Fact Sheet. In addition to identifying impairments, the table serves to

identify the beneficial uses and the constituents of potential concern from the SWRCB Monitoring List. Regarding the length of the Santa Margarita River, it is appropriate to list the length of the impaired portion, regardless of the county boundary. Activities in the upper watershed affect the entire Santa Margarita River. However, it will be noted that the upper 1.8 miles of the river lies within Riverside County.

Regarding the third paragraph of the comment, phosphorus exceedances are important, as are all exceedances of water quality objectives, because they indicate a potential impairment of beneficial uses. Excess phosphorus can over-stimulate growth of algae and aquatic plants, which can later, through decay, reduce oxygen levels and adversely affect other organisms. This can cause a decline in sensitive species and an over-abundance of nutrient-tolerant fish species, decreasing overall diversity of the aquatic community. Algal blooms caused by excess nutrients can also cloud the water and block out sunlight, causing underwater plant life to die. Because these plants provide food and shelter for aquatic creatures, spawning and nursery habitat is destroyed. This also reduces food for waterfowl. Beneficial uses that could potentially be impaired by excess phosphorus include MUN, REC1, REC2, WARM, COLD, WILD and RARE.

Regarding the fourth paragraph of the comment, the Monitoring List is important because it identifies potential future impairments that the Permittees need to be aware of while developing and implementing urban runoff management programs. Targeted management actions could possibly prevent future and/or further impairments. The fact that there are no primary drinking water MCLs for any of the listed parameters does not mean that they are not important. There are many beneficial uses of the waters in the Santa Margarita Watershed in addition to MUN that must be appropriately addressed and adequately protected.

152. Comment - Section VI.D Impacts to Human Health (Finding No. 7) (District, March 10, 2004):

The Permittees concur that this watershed is subject to extreme erosion, and that the channel beds are highly unstable. The Permittees enter the following excerpt from State of California Department of Public Works Division of Water Resources, Bulletin No. 57 – Santa Margarita River Investigation, June, 1956, Pages 50:

"Major floods have caused destruction and havoc in the watershed of the Santa Margarita River since the days of earliest Development."

In addition to extreme flood conditions, the region is subject to past and on-going changes in geology and is highly susceptible to erosion,. In the recent past Temecula and Murrieta Creeks drained to Lake Elsinore and the Santa Ana River. The diversion of Temecula and Murrieta Creek to the Santa Margarita River occurred since the last ice age (as early as 11,000 years ago). The general sedimentation occurring in the Santa Margarita Region is primarily a response to this relatively recent geologic event:

"In early Pleistocene time, drainage was southwesterly across the Perris block and Santa Margarita region. During middle Pleistocene the Pasadenan orogeny occurred, accompanied by uplift and erosion. The San Jacinto, Santa Ana, and Palomar Mountains were uplifted and the

Elsinore trough was downfaulted. The Santa Ana River, located northwest of the watershed, developed a subsequent tributary down the Elsinore trough and captured Temecula Creek.

The Upper Pleistocene epoch was characterized by the deposition of the Pauba formation, faulting, and by headward erosion by the Santa Margarita River resulting in the eventual capture of Murrieta and Temecula Creeks and the change of drainage direction to the present southwesterly course through Temecula Canyon. Larsen suggests that the San Luis Rey River similarly may capture in the early geologic future the drainage of Temecula Creek. During Upper Pleistocene time downfaulting of the Elsinore trough continued and Murrieta graben in its present configuration was formed. The Dripping Springs fanglomerates were also deposited during this time. In the late Pleistocene the Nigger Canyon volcanics were emplaced. Deposition of alluvial sediments and movement along older faults has continued to the present." (State of California Department of Public Works Division of Water Resources, Bulletin No. 57 – Santa Margarita River Investigation, June, 1956, Pages B-41 and B-42).

The region is well documented to being susceptible to flood, erosion and changing geology. These natural impacts are the main contributors to sediment problems downstream.

Response:

This comment, while probably technically correct on the recent geology of the area, has little relevance to Finding No. 7.

153. Comment - Section VI.E Impacts from Urbanization (Finding No. 10) (District, March 10, 2004):

Increases in volume and discharge of runoff due to urbanization are substantial only in smaller storm events. During larger storm events, soil saturation increases, ultimately to the point of full saturation. The USGS has indicated that under typical conditions, the incremental discharge impacts of increased impervious area are reduced to negligible by a 50-year return period due to soil saturation. This study was completed in the San Jacinto Watershed, which is within Riverside County and hydrologically similar to the Santa Margarita. (U.S. Geological Survey, Digital Simulation of the Effects of Urbanization on Runoff in the Upper Santa Ana Valley, California)

Response:

The SDRWQCB agrees that due to urbanization, there is a substantial increase in volume and rates of runoff during smaller storm events.¹⁰⁰ The intent of the requirements in the tentative Order is to control peak rates, velocities, volumes, and durations from these smaller storms to maintain or reduce downstream erosion and not to be applicable to the 50 or 100-year storm events.

154. Comment - Section VI.E Impacts from Urbanization (Finding No. 10) (District, March 10, 2004):

¹⁰⁰ Guay, J. 1996. Effects of Increased Urbanization from 1970s to 1990s on Storm Runoff Characteristics in Perris Valley, California.

Please see the comment 4 [Comment No. 152] above for the discussion about the historical susceptibility of this watershed to extreme flooding, erosion and geologic faulting. The statements above [in Section VI.E of the draft Fact Sheet] misrepresent several facts related to this watershed. First, the construction of Skinner and Vail Lakes has removed over half of the drainage area tributary to Murrieta Creek. The net effect has been a reduction of 20-40% in peak flows and volumes from the natural condition for a given rainfall depth. It is estimated that the ultimate build out condition within this watershed will not result in peak flows or volumes exceeding the pre-dam existing condition. Further, this area has been historically subject to flooding. In the late 1800's a rail line through the Gorge was abandoned after 20 miles of track were washed out twice within 8 years. The rail line was only 9 years old.

Further the population of the Santa Margarita Watershed stayed relatively constant (less than 2000 people) until the 1980s. The floods of 1938, 1969 and 1980 occurred prior to the rapid urbanization of this watershed. Finally, the significant flood damage that led to the Presidential Disaster declarations is not due to the impacts of increased volume and velocity, but due to the encroachment of Old Town Temecula, and several individual homes, upon the Murrieta and Temecula Creek floodplains. Old Town Temecula significantly encroached upon, and constrained, the Murrieta Creek floodplain. This has led to significant flooding of, and damage to this area in even moderate events. None of the controls proposed within the tentative Order could have prevented, or reduced, the peak, volume, or damage that occurred during those floods. Nor will the controls proposed in the tentative Order have any substantial impact on future floods within this watershed.

Response:

The intent of the requirements in the tentative Order is to control peak rates, velocities, volumes, and durations from frequent smaller storms to maintain downstream erosion and not to be applicable to the 50 or 100-year storm events. It is the responsibility of the Permittees to develop the storm event frequency and/or criteria that will maintain or reduce downstream erosion and adequately protect stream habitat.

155. Comment - Section VIII.C Discussion of RWL Requirements (District, March 10, 2004):

If a BMP is not working, increasingly stringent BMPs may not be the only answer. A solution may be as simple as changing the BMP being used with a similarly-stringent (e.g., based on new technology), but more effective, one.

Response:

Comment noted.

156. Comment - Section VIII.C Discussion of RWL Requirements (District, March 10, 2004):

"As ... TMDLs ... are developed, it is likely that MS4s will have to participate in pollutant load reductions, and the MS4 permits are the most effective vehicles for those reductions." Once a TMDL is established for a waterbody, the MS4 permit may implement the load allocation assigned to the urban land use, but the MS4 permit is not intended, nor does the quoted legal

opinion imply, that the MS4 permits were to take the place of the TMDL study for all land uses identified in a given watershed.

Response:

Comment noted.

157. Comment - Section VIII.D Specific Legal Authority for Legal Authority Requirements (District, March 10, 2004):

40CFR122.26(d)(1)(ii) is a requirement that a description of adequate legal authority be submitted with Part 1 of a first-time application. The Permittees have complied with this requirement.

Response:

Comment noted. If the Permittees already have adequate legal authority to implement the permit, then they should be capable of implementing the requirements within the allotted 365 days, if not immediately.

158. Comment - Section VIII G (District, March 10, 2004):

The Permittees would note that the EPA guidance goes on to discuss that construction site BMP technologies and practices "rely predominantly on erosion and sediment controls and other measures applicable to construction sites (e.g., control of solid wastes, and prohibitions on discharging concrete truck washing runoff into the storm drain)". It is clear that the intention of this provision was to regulate sites with land disturbing activities. The Permittees would note that the current definition of construction project includes any project requiring a grading or building permit. This would include water heater installations, patio covers, and other projects not contemplated within these regulations. The Permittees continue to recommend that the definition of construction project be revised consistent with the definition proposed as part of our Construction Database white paper submitted on January 28.

Response:

Comment noted. The definition of construction project has been revised to cover only land disturbing activities.

159. Comment - Section VIII.J Specific Legal Authority for Illicit Discharge Detection and Elimination (District, March 10, 2004):

The correct reference is 40CFR122.26(d)(2)(iv)(B)(5).

Response:

The change to the reference has been made.

160. Comment - Section VIII.J Comments on Existing and Proposed Illicit Discharge Detection and Elimination Programs (District, March 10, 2004):

The paragraph implies that separate hotlines [public reporting mechanism for illicit discharges] will need to be developed for each city to comply with Requirement J.8. on page 28 of the draft Permit allows a shared hotline. The Fact Sheet language needs to be made consistent with the permit text.

Response:

Comment noted. The text will be changed to read: "The reports do not mention hotlines for the Cities of Murrieta and Temecula. If the Cities do not have their own reporting hotlines, the Individual SWMPs should describe how the county-wide hotline coordinates with the Cities when necessary."

161. Comment - Section VIII.K Comments Existing and Proposed Watershed Programs (District, March 10, 2004):

The Permittees in the Santa Ana and Santa Margarita Regions of Riverside County have been meeting jointly for monthly meetings since the inception of the urban runoff management programs in the early 1990s. This has been, and continues to be appropriate as the water quality management issues in both watersheds are similar. To the extent possible, the compliance programs implemented in these areas have been and will, to the extent possible, continue to be implemented consistently throughout both regions. Most importantly, as has been noted in our comments regarding the Tentative Order, three of the four Permittees in the Santa Margarita Region are also Permittees in the Santa Ana Region. The representatives from the City of Temecula have not been adverse to hearing about matters related to the Santa Ana Region nor have the Permittees outside of the Santa Margarita Region been adverse to hearing about matters related to that region.

Response:

Comment noted. This discussion in the Fact Sheet is a suggestion, not a requirement.

162. Comment - Section IX.A Specific Legal Authority for Receiving Waters Monitoring Requirements (District, March 10, 2004):

40CFR122.26(d)(2) and subsections contain the requirements for what is to be included in Part 2 of a first-time MS4 application. The SWRCB and SDRWQCB supported application under an "Early" permit process that was prompted by EPA Region IX, in recognition that the monitoring requirements in 40CFR122 did not make much sense for ephemeral portions of watersheds. As the Permittees applied for and were issued an "Early" permit, the Part 1 and Part 2 permit application process was superseded.

Response:

The Permittees have not provided to the SDRWQCB documentation that the EPA recognized that the monitoring requirements in 40 CFR 122 "did not make much sense" for the permitted area. The *Consolidated Program for Water Quality Monitoring*, approved by the EPA with a few additional requirements, contains similar objectives and monitoring components required in the tentative Monitoring and Reporting Program. Furthermore, EPA's written comments, dated March 5, 2004, on the tentative Order support the proposed Receiving Water Monitoring requirements. EPA comments state, "We are pleased to see that the Board has proposed to include a variety of storm water environmental indicators (chemical, toxicity and bioassessment) in the proposed monitoring program, rather than focusing on chemical monitoring which has been a tendency in the past...we believe that protecting the important aquatic resources of the Santa Margarita River and its tributary streams provides full justification for the monitoring program."

163. Comment - Section IX.A Discussion of Monitoring Program Requirements (District, March 10, 2004):

40 CFR 122.21(g)(7)(ii) refers to application requirements for existing manufacturing, commercial, mining, and silvicultural dischargers.

Response:

40 CFR 122.26(d)(2) and EPA's NPDES Storm Water Sampling Guidance Document (EPA 833-B-92-001) state that municipal storm water samples must be taken in accordance with 40 CFR 122.21(g)(7) and 40 CFR 136.

164. Comment - Section IX.A Monitoring Program Costs (District, March 10, 2004):

The Permittees prepared a cost assessment of the draft Monitoring and Reporting Program, which is included as a separate attachment. The calculated cost burden of the draft Monitoring and Reporting Program, based on actual laboratory analysis and staff labor costs, is more than four times what was presented as the average of Orange and San Diego County's per capita costs.

Response:

Comment noted. The monitoring stations and frequency of sampling has been reduced.

165. Comment - Section IX.A, Table 6, footnotes 4 and 6 (District, March 10, 2004):

Basis for per capita costs are not equivalent, and an average per capita cost based on these numbers is inappropriate.

Response:

The estimated monitoring program costs presented in Section IX.A of the Fact Sheet are based on the best available cost information. They are not intended to be exact values for the Tentative Monitoring Program, but estimates to allow for an informed consideration of costs.